A TREATISE

ON THE

LAW OF EVIDENCE,

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

ILLUSTRATIONS FROM THE AMERICAN AND OTHER FOREIGN LAWS.

THIRD EDITION.

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IN TWO VOLUMES.

VOL. II.

Longum iter est per præcepta,
Breve et efficax per exempla.—Seneca

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CONTINUATION OF PART II.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.

CHAPTER XVII.

MATTERS NOT PROVEABLE BY A SINGLE WITNESS.[1]

§ 869.[2] UNDER this head it is not proposed to go into an extended consideration of the Statutes of Treason, but only to mention briefly some instances in which those Acts, and some other statutes and rules of law, have regulated particular cases, taking them out of the operation of the general principles, by which they would otherwise be governed. Thus, in regard to *treason* and misprision of treason, though by the common law these crimes were sufficiently proved by one credible witness,[3] it has been deemed expedient to enact, that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of *two lawful witnesses*, either both to the same overt act, or one to one, and the other to another overt act of the same treason, unless the accused shall willingly without violence, in open court, confess the same;[4] and further, that if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason.[5]

§ 870. This protective rule, which in England has remained in

[1] The substance of this Chapter first appeared in the Law Rev., No. 7, pp. 123—135.
[2] Gr. Ev., § 255, in part.
[3] Foster, Cr. L. 233; M'Nally Ev. 31; R. v. Clare, 28 How. St. Tr. 887, 924; Woodbeck v. Keller, 6 Cowen, 120.
[4] As to the confession, see ante, § 792.
[5] 7 Will. 3, c. 3, §§ 2, 4; extended to Ireland by 1 & 2 Geo. 4, c. 24. The Acts of 1 Edw. 6, c. 12, § 22, 5 & 6 Edw. 6, c. 11, § 12, and 1 & 2 Ph. & M. c. 10, § 11, contain provisions of a like nature.

its present state since the days of King William III., and in Ireland, was adopted in the year 1821, has been incorporated, with some slight variation, into the constitution of America,[1] and may be met with in the statutes of most, if not all, of the States in the Union. The first notice that we have of this rule, is in a repealed Act of the time of Henry VIII.,[2] and from the language there employed it appears probable, that the original reason for its adoption was that stated by Lord Nottingham on Lord Strafford's trial: "Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason."[3]

§ 871. Its continuance in modern times may perhaps be ascribed, in part, to the obstinacy with which men cling to established forms of proceeding; in part, to the accused's oath and duty of allegiance, which may be supposed to counterpoise the information of a single witness;[1] and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused, while the counter-presumption, that on so serious a trial no witness would be guilty of criminative perjury, is forgotten.[5] But, possibly, the best reason for the regulation is, that, on state trials, the prisoner has to contend against the whole power of the Crown; that this power is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused, and to his family, are savage and revolting. A man of calm reflection may consider this last reason an indifferent one; and may think that the Legislature would confer no trifling benefit on the country, if it defined the law of

[1] "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt* act, or on confession in open court." Const. U. S. Art. 3, § 3; Laws U. S., vol. 2, ch. 36, § 1.

[2] 25 Hen. 8, c. 14.

[3] T. Raym. 408.

[4] 4 Bl. Com. 358.

3 Bentham Ev., 391, 392.

treason with greater accuracy, and if, by abolishing alike the cruelties which make it abhorrent, and the protections which make it ridiculous, it rendered the punishment of traitors more certain and less barbarous.

§ 872. Notwithstanding the above rule, any *collateral* matter, not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extra-judicial confession of the prisoner, or by other evidence admissible at common law.[1] For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the British Crown may be established by his admission, or by the testimony of one witness.[2]

§ 873.[3] In treason, and misprision of treason, no evidence can be given of any overt act, which is not expressly laid in the indictment.[4] But the meaning of this rule is, not that the whole detail of facts shall be set forth, but that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment, or unless it conduce to the proof of any of the overt acts, which are laid.[5] For instance, in Layer's case,[6] the prisoner's correspondence with the Pretender was allowed to be read in evidence, as tending directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne, though this correspondence was a substantive treason in itself,[7] and was not charged as an overt act in the indictment; and on the same ground the publication of the Pretender's manifesto by Mr. Deacon was read against

[1] Foster Cr. L. 242; 1 East, P. C. 130.

[2] R. v. Vaughan, 15 How. St. Tr. 535, per Lord Holt; Foster, C. L. 240, S. C.

[3] Gr. Ev., § 256, in part as to first six lines.

[4] 7 Will. 3, c. 3, § 8. This section is not incorporated in the Irish Act of 1 & 2 Geo. 4, c. 24, but it being also a rule at common law, this would seem to be immaterial.

[5] Foster, Cr. L. 245; 1 East, P. C. 121—123.

[6] 16 How. St. Tr. 220—223; Foster, Cr. L. 245, 246, S. C.

[7] By 13 Will. 3, c. 3, § 2. See 17 Geo. 2, c. 39.

him in 1746, as strongly proving with what intention he had joined the rebel army, and as supporting the overt act laid in the indictment of marching in a warlike manner to depose the King.[1] On the other hand, when Captain Vaughan was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the Loyal Clancarty, the Court rejected evidence of his cruizing in another vessel; as, if it were true, it would be no sort of proof of the act, for which he was then to answer.[2]

§ 874.[3] This rule is not peculiar to trials for treason; though in consequence of the oppressive character of some former prosecutions for that crime, it has been deemed expedient expressly to enact it in the later statutes of treason. It is nothing more than a particular application of the well-known doctrine, that the proof must correspond with the allegations, and be confined to the point in issue.[4] The issue in treason is, whether the prisoner committed that crime by doing one or more of the treasonable acts stated in the indictment; as in defamation the question is, whether the defendant injured the plaintiff by maliciously uttering any of the slanders laid in the declaration; and evidence of collateral facts is admitted or rejected on the like principle, in either case, according as it does or does not tend to establish the specific charge. Therefore the declarations of the prisoner, and seditious language used by him, are admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged.[5] And in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in other counties, may be given in evidence; subject, however, to be ultimately rejected, if the overt act, in corroboration of which they are tendered, is not proved to have been done in the county as laid.[6]

[1] R. v. Deacon, Foster, Cr. L. 9; 18 How. St. Tr. 366, S. C.; R. v. Wedderburn, Foster, Cr. L. 22; 18 How. St. Tr. 425, S. C.

[2] R. v. Vaughan, 15 How. St. Tr. 499, 500; Foster, Cr. L. 246, S. C.

[3] Gr. Ev., § 256, in part.

[4] Ante, §§ 173, 239.

[5] R. v. Watson, 2 Stark. R. 132—135.

[6] R. v. Layer, 16 How. St. Tr. 164; R. v. Deacon, 18 id. 367; Foster,

§ 875. It remains to be noticed in connexion with this subject, that the protective provisions of the Statutes of Treason[1] do not apply to the particular class of treasons, which consists in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, where the overt act or acts alleged shall be the assassination of Her Majesty, or any attempt to injure in any manner whatsoever her Royal person; or to the misprisions of any such treason; but in all these cases the accused shall be indicted, arraigned, tried and attainted, in the same manner, and according to the same course and order of trial, and *upon the like evidence*, as if he stood charged with murder; though upon conviction, judgment shall be given, and execution done, as in other cases of high treason.[2]

§ 876.[3] It seems to have been formerly thought, that, in proof of the crime of *perjury*, *two* witnesses were *necessary*;[4] but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.[5] The oath of the opposing witness, therefore, will not avail, unless it be corroborated by material and independent circumstances; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, it is considered that the jury could not safely convict.[6] So far the rule is founded on substantial justice.[7] But

Cr. L. 9, 10, S. C.; R. v. Vane, 6 How. St. Tr. 123—129; 1 East, P. C. 125, 126.

[1] 7 Ann., c. 21; 7 Will. 3, c. 3; 6 Geo. 3, c. 53, § 3.

[2] 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, Ir.; 5 & 6 Vict., c. 51, § 1. Sect. 2 of this last Act makes it a high misdemeanor to discharge or aim fire-arms, or throw or use any offensive matter or weapon, with intent to injure or alarm Her Majesty.

[3] Gr. Ev. § 257, in part.

[4] This is said to have been the opinion of Lord Tenterden; 3 St. Ev. 860, n. *q*; R. v. Champney, 2 Lew. C. C. 259, per Coleridge, J.

[5] See R. v. Lee, cited 2 Russ. C. & M. 650.

[6] 4 Bl. Com. 358; R. v. Gaynor, 1 Cr. & Dix, Ir. Cir. R. 142; Jebb, C. C. 262, S. C.

[7] R. v. Yates, C. & Marsh. 139, per Coleridge, J.

it is not precisely accurate to say, that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose.[1] Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness.[2] Still, evidence confirmatory of the single accusing witness in some slight particulars only, will not be sufficient to warrant a conviction;[3] but it must at least be strongly corroborative of his testimony;[4] or, to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant."[5]

§ 877.[6] When several assignments of perjury are included in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each; but the better opinion is that such proof is necessary; and *that* too, although all the perjuries assigned were committed at one time and place.[7] For instance, if a person, on putting in his schedule in the Insolvent Debtors' Court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.[8]

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[1] R. v. Gardiner, 8 C. & P. 737, per Patteson, J.; 2 Moo. C. C. 95, S. C.

[2] R. v. Mayhew, 6 C. & P. 315, per Lord Denman.

[3] R. v. Yates, C. & Marsh. 139, per Coleridge, J.; R. v. Boulter, 2 Den. 396; 3 C. & Kir. 236, S. C.

[4] R. v. Champney, and R. v. Wigley, 2 Lew. C. C. 258, 259, n., per Coleridge, J.; Jorden v. Money, 5 H. of L. Cas. 231, 232, per Lord Brougham; Woodbeck v. Keller, 6 Cowen, 118, 121, per Sutherland, J.

[5] R. v. Muscot, 10 Mod. 194. See the State v. Molier, 1 Dev. 263, 265; The State v. Hayward, 1 Nott & M'Cord, 547; Clark's Exors. v. Van Reimsdyk, 9 Cranch, 160.

[6] Gr. Ev., § 257 a, nearly verbatim.

[7] R. v. Virrier, 12 A. & E. 324, per Lord Denman.

[8] R. v. Parker, C. & Marsh. 639, 645—647, per Tindal, C. J. In R. v. Mudie, 1 M. & Rob. 128, 129, Lord Tenterden, under similar circumstances, refused to

§ 878.[1] The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America, that a man may be convicted of perjury on documentary and circumstantial evidence alone,—*first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other writings, which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.[2]

§ 879.[3] If the evidence adduced in proof of the crime of perjury consists of *two opposing statements by the prisoner*, and nothing more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an

stop the case, saying that if the defendant was convicted he might move for a new trial. He was however acquitted. [1] Gr. Ev., § 258, in part.

[2] U. S. *v.* Wood, 14 Peters, 430, 440—442. In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise, have been actually purchased," upon the evidence of the invoice-book of his father, John Wood of Saddleworth, Eng., and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the Government of the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves an attentive perusal.

[3] Gr. Ev., § 259, in great part.

error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances, against him.[1] And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given.[2] If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered* with,[3] or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained;[4] and provided the nature of the statements was such, that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that, because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without to swear falsely either time.[5] Moreover, when a man

[1] See Alison's Prin. of Crim. Law of Scot. 481.

[2] R. *v.* Wheatland, 8 C. & P. 238, 241, per Gurney, B.; R. *v.* Gaynor, 1 Cr. & Dix, Ir. Cir. R. 142; Jebb, C. C. 262, S. C.; R. *v.* Harris, 5 B. & A. 926.

[3] Anon., per Yates, J., Lord Mansfield, Wilmot, and Aston, Js., concurring; 5 B. & A. 939, 940, n. See the observations of Mr. Greaves on this case, in 2 Russ. C. & M. 653, n.

[4] R. *v.* Knill, 5 B. & A. 929, 930, n.

[5] Per Holroyd, J., in R. *v.* Jackson, 1 Lew. C. C. 270. This very reasonable doctrine is in perfect accordance with the rule of the Criminal Law of Scotland, as laid down by Mr. Alison, in his excellent treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded, that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the

merely swears to the best of his *memory and belief*, it of course requires very strong proof to show that he is wilfully perjured.[1]

§ 880. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the Court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient were the prisoner charged with any other offence.[2] Moreover, when several facts must be proved to make out an assignment of perjury, each of these facts may, in strict law, be established by the uncontroverted testimony of a single witness. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury.[3]

§ 881. In cases of *bastardy*, a man cannot be adjudged to be the putative father of an illegitimate child on the single testimony of the mother; but before an order of affiliation can be made by the petty sessions,[4] or confirmed by the quarter sessions,[5] the evidence of the mother must be corroborated, *in some material*

opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognised; but it is now justly considered indispensable, that the perjury should be specified as existing in one, and the other deposition referred to *in modum probationis*, to make out, along with other circumstances, where the truth really lay." See Alison's Princip. of Crim. Law of Scot. 476.

[1] Per Tindal, C. J., in R. *v.* Parker, C. & Marsh. 645.

[2] 2 Russ. C. & M. 654; 2 Hawk. P. C. c. 46, § 10.

[3] R. *v.* Roberts, 2 C. & Kir. 614, per Patteson, J.

[4] 7 & 8 Vict., c. 101, § 3.

[5] 8 & 9 Vict., c. 10, § 6.

particular, by other testimony, to the satisfaction of the justices; and the order will be bad, if it does not allege that the confirmatory evidence was material.[1] This rule has been wisely established, in order to protect men from accusations which profligate, designing, and interested women might easily make, and which, however false, it might be extremely difficult to disprove.

§ 882.[2] The principles above stated, in regard to the proof of perjury, apply with equal force to the case of *an answer in Chancery*. Formerly, when a material fact was directly put in issue by the answer, the courts of equity followed the maxim of the Roman law, Responsio unius non omninò audiatur, and required the evidence of two witnesses as the foundation of a decree. But of late years the rule has been referred more strictly to the equitable principle on which it is founded, namely, the right to equal credit with any other witness, which the defendant may claim in all cases, where his answer is "positively, clearly, and precisely" responsive to any matter recited in the bill. For the plaintiff, by calling on the defendant to answer an allegation which he makes, thereby admits the answer to be evidence.[3] In such case, if the defendant in express terms negatives the allegations in the bill, and the bill is supported by the testimony of only a single witness, affirming what has been so denied, the Court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill.[4] But the corroborating

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[1] R. *v.* Read, 9 A. & E. 619; 1 P. & D. 413, S. C.; 8 & 9 Vict. c. 10, § 1, and Schedule, Nos. 7 & 8. In R. *v.* Js. of Bucks, 14 L. J., M. C. 45, it was held; that all the evidence must be given upon oath, and that this fact must appear on the face of the order; but though the first point there ruled is still unquestionably the law, the second is no longer material, as the forms given in the Schedule of 8 & 9 Vict., c. 10, omit all mention of an oath, and § 1 of that Act declares the forms to be valid.

[2] Gr. Ev., § 260, in great part.

[3] Gresley Ev. 4; East India Co. *v.* Donald, 9 Ves. 282—284.

[4] Cooth *v.* Jackson, 6 Ves. 40, per Lord Eldon; Evans *v.* Bicknell, 6 Ves. 184; Cooke *v.* Clayworth, 18 Ves. 12; Money *v.* Jordan, 2 De Gex, M. & Gord. 336, 337, per Lord Cranworth; Carpenter *v.* Providence Washington Ins. Co., 4 Howard, S. Ct. R. 185, 217—219, per Woodbury, J.; Towne *v.* Smith, 1 Woodb. & Min. 118, per id.

evidence of an additional witness, or of a letter of the defendant,[1] or of other circumstances,[2] may give a turn either way to the balance. And, indeed, the evidence arising from circumstances alone may be stronger than the testimony of any single witness.[3]

§ 883. In the *Ecclesiastical Courts* the testimony of a single witness, though omni exceptione major, is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call "adminicular circumstances."[4] This doctrine was in former days productive of much injustice,[5] but it is now of little practical importance, as the spiritual courts have, by a series of legislative improvements, been shorn of their jurisdiction—first, over suits for defamation[6]—next, in relation to the grant and revocation of probates of wills and letters of administration, and to all matters and causes testamentary,[7]—and lastly, in respect of divorces a mensâ et thoro, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and indeed, all causes, writs, and matters matrimonial.[8] In the new Courts of Probate, both for England and Ireland, and in the new Court for Divorce and Matrimonial causes, the rules of evidence observed in the superior Courts of Common Law are applied to the trial of all questions of fact.[9]

§ 887. It remains only to mention the case of *accomplices*, who

[1] Keys *v.* Williams, 3 You. & Coll., Ex. R., 55 ; Dawson *v.* Massey, 1 Ball & Bea. 234 ; Savage *v.* Brocksopp, 18 Ves. 335.

[2] Smith *v.* Constant, 20 L. J., Ch., 128, per Knight Bruce, V. C. ; Sharry *v.* Garty, 2 Ir. Eq. R., N. S., 358 ; Jorden *v.* Money, 5 H. of L. Cas., 185, 217, 218, per Lord Cranworth, Ch. ; Gray *v.* Haig, 20 Beav. 219.

[3] Pember *v.* Mathers, 1 Bro. Ch. R. 52 ; 2 Story on Eq. Juris., § 1528 ; Gresley Ev. 4 ; Clark's Exors. *v.* Van Reimsdyk, 9 Cranch, 160.

[4] Donellan *v.* Donellan, 2 Hagg. Ec. R. 144 (Suppl.) ; Simmonds *v.* Simmonds, 5 Ec. & Mar. Car. 324, 340—347, per Dr. Lushington ; id. 6 Ec. & Mar. Cas. 578, per Sir H. J. Fust ; Crompton *v.* Butler, 1 Cons. R. 460 ; Hutchins *v.* Denziloe, 1 Cons. R. 181, 182.

[5] See cases cited and discussed in 2nd ed. of this work, §§ 883—886.

[6] 18 & 19 Vict., c. 41.

[7] 20 & 21 Vict., c. 77, § 3 ; 20 & 21 Vict., c. 79, § 5., Ir.

[8] 20 & 21 Vict., c. 85, § 2.

[9] 20 & 21 Vict., c. 77, § 33 ; 20 & 21 Vict., c. 79, § 38, Ir. ; 20 & 21 Vict., c. 85, § 48.

are usually interested, and always infamous witnesses, and whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice. The[1] *degree of credit*, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please, act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement.[2] It is true that judges, in their discretion, will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration; and the practice of giving such advice is now so general, that its omission would be deemed a neglect of duty on the part of the judge.[3] Considering, too, the respect which is always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, excepting under very special circumstances, upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but only advise them not to give credit to the testimony.

§ 888. It has been stated, that this practice is not applicable to cases of *misdemeanor;*[4] but there appears to be no foundation, either in reason or law, for such a distinction between misdemeanors and felonies; and, in fact, the distinction, if it ever existed, no longer prevails.[5] The extent of corroboration will

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[1] Gr. Ev., § 380, in great part.

[2] R. *v.* Stubbs, 25 L. J., M. C., 16; 1 Pearce & Dears. C. C. 555, S. C.; R. *v.* Hastings, 7 C. & P. 152, per Lord Denman; R. *v.* Jones, 2 Camp. 132, per Lord Ellenborough; 31 How. St. Tr. 315, S. C.; R. *v.* Atwood, 1 Lea. C. C. 464; R. *v.* Durham, ib. 478; R. *v.* Dawber, 3 Stark. R. 34; R. *v.* Sheehan, Jebb, C. C. 54; R. *v.* Jarvis, 2 M. & Rob. 40.

[3] R. *v.* Barnard, 1 C. & P. 88; R. *v.* Wilkes, 7 C. & P. 273.

[4] Per Gibbs, Att.-Gen. arg. in R. *v.* Jones, 31 How. St. Tr. 315.

[5] R. *v.* Farler, 8 C. & P. 106.

of course depend much upon the nature of the crime,[1] and the degree of moral guilt attached to its commission; and if the offence be one of a purely legal character, as, for instance, the non-repair of a highway,—or if it imply no great moral delinquency, as the fact of having been present at a prize-fight, which unfortunately terminated in manslaughter,[2]—the parties concerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence.

§ 889.[3] Though it is thus the settled practice to require other evidence in corroboration of that of an accomplice; yet the *manner and extent of the corroboration* required are not so clearly defined. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; but others, with more reason, have thought it essential that corroborative proof should be given of the *prisoner* having actually participated in the offence; and when several prisoners are tried, that confirmation should be required as to all of them, before all can be safely convicted.[4] This last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the commission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but on the contrary, every motive to declare the truth, if he intends to be believed when he shall afterwards fix the crime upon the prisoner.[5]

§ 890. This doctrine has been well explained by the late Lord

[1] R. *v.* Jarvis, 2 M. & Rob. 40, 52, per Gurney, B.
[2] R. *v.* Hargrave, 5 C. & P. 170, per Patteson, J.
[3] Gr. Ev., § 381, in great part.
[4] R. *v.* Stubbs, 25 L. J., M. C., 16; 1 Pearce & Dears. C. C. 555, S. C.
[5] R. *v.* Farler, 8 C. & P. 106, per Lord Abinger; R. *v.* Wilkes, 7 C. & P. 272, per Alderson, B.; R. *v.* Moores, ib. 270; R. *v.* Addis, 6 C. & P. 388, per Patteson, J.; R. *v.* Wells, M. & M. 326, per Littledale, J.; R. *v.* Sheehan, Jebb, C. C. 54; R. *v.* Carey, id. 203.

Abinger. "It is a practice," said his lordship, in a case of night-poaching,[1] "which deserves all the reverence of the law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects *the identity of the party accused.* A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. * * * The danger is, that when a man is fixed, and knows that his own guilt is detected, he will purchase impunity by falsely accusing others." If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if they were but one.[2] The testimony, too, of the wife of an accomplice will not be considered corroborative of the evidence of her husband.[3]

§ 891.[4] One class of persons, *apparently accomplices,* may here be named, to whom the rule requiring corroborating evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far advanced and matured as to insure their conviction and punishment. The

[1] R. *v.* Farler, 8 C. & P. 107, 108.

[2] R. *v.* Noakes, 5 C. & P. 326, per Littledale, J.; R. *v.* Magill, Ir. Cir. R. 418, per Perrin, J.

[3] R. *v.* Neal, 7 C. & P. 168, per Park, J.

[4] Gr. Ev., § 382, almost verbatim.

early disclosure is considered as binding the party to his duty; and though a great degree of objection or disfavour may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as that of an accomplice.[1]

[1] R. v. Despard, 28 How. St. Tr. 489, per Lord Ellenborough.



CHAPTER XVIII.

MATTERS REQUIRING TO BE EVIDENCED BY WRITINGS.

§ 892. In the present chapter will be considered briefly those matters, for the proof of which the law requires a *written document* more or less formally executed; and, *first, as to those transactions*, which, at *common law*, are required to be evidenced by deed. The most important of these relate to *incorporeal rights;* and it is now clearly determined, that all such rights, whether they amount to an interest in land or not, lie in *grant*, and as such can neither be created, assigned, demised, or surrendered, except by *deed*.[1] The term "incorporeal rights" includes among other things, advowsons, ferries,[2] rents, interests in land not in possession, as remainders, or reversions for life or years, profits à prendre, easements, and the like; and the principle which requires such rights to be evidenced by documents under seal, does not depend on the quality or amount of interest granted, transferred, or surrendered, but on the nature of the subject-matter; a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement or right in nature of an easement, can no more be granted or conveyed for life or for years or even for days without a deed, than in fee-simple.[3] So strictly has this rule been interpreted, that even a ticket of admission to a theatre during a season, or to a grand-stand during the races, can afford no irrevocable title to the party purchasing it; but, after notice of revocation, he can be removed by the owner of the premises, without assigning any

[1] Wood *v.* Leadbitter, 13 M. & W. 842, 843; Hewlins *v.* Shippam, 5 B. & C. 229; Co. Lit. 337 b, 338 a; 2 Shepp. Touch. by Preston, p. 300; 1 Wms. Saund. 236 a; Lyon *v.* Reed, 13 M. & W. 303—305; Bird *v.* Higginson, 2 A. & E. 696; 6 A. & E. 824, S. C.; Mayfield *v.* Robinson, 7 Q. B. 486; Roffey *v.* Henderson, 17 Q. B. 574.

[2] Mayfield *v.* Robinson, 7 Q. B. 486.

[3] Wood *v.* Leadbitter, 13 M. & W. 843, per Alderson, B. See Williams *v.* Morris, 8 M. & W. 488; Perry *v.* Fitzhowe, 8 Q. B. 757, 777, 778.

reason, and without so much as returning the price of the ticket; and his only remedy, if any, is to bring an action, founded on a breach of contract, against the person who sold the ticket, or against those who authorised its sale.[1] It further deserves notice, that, while a mere personal licence of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal,[2] the privileges of hunting, fishing, or shooting, if granted to a party and his assigns, and if coupled with a right of taking away the game when killed, will be profits à prendre, and as such may be, and can only be, irrevocably granted by deed.[3]

§ 893. Although a parol demise of an incorporeal hereditament passes no estate, it by no means follows, that the party who actually occupies and enjoys the thing so demised, is protected from all liability to pay for his occupation and enjoyment; and the better opinion is, that the grantor will still be entitled to recover from the garantee, in a count for use and occupation, such reasonable sum as the jury shall assess, for the actual enjoyment of the hereditament demised.[4]

§ 894. With respect to the transfer of personal property the law appears to be as follows:—A donatio mortis causâ passes no property to the donee without delivery;[5] and it is immaterial whether at the time of the gift the chattel be in the actual possession of the donor or of the donee The gift of a chattel

[1] Wood *v.* Leadbitter, 13 M. & W. 838, 843—855; overruling Tayler *v.* Waters, 7 Taunt. 374; and explaining Webb *v.* Paternoster, Palmer, 71; Roll. 143, 152; Noy, 98; Popham, 151, and Godbolt, 282, S. C.; Wood *v.* Lake, Sayer, 3; and Wood *v.* Manley, 11 A. & E. 34; 3 P. & D. 5, S. C. See also Taplin *v.* Florence, 10 Com. B. 744.

[2] Wood *v.* Leadbitter, 13 M. & W. 844, 845; Wickham *v.* Hawker, 7 M. & W. 79; Thomas *v.* Sorrell, Vaughan, 351.

[3] Doe *v.* Lock, 2 A. & E. 705; Wickham *v.* Hawker, 7 M. & W. 63; recognised in Durham & Sunderland Rail. Co. *v.* Walker, 2 Q. B. 967; Bird *v.* Higginson, 2 A. & E. 696; 6 A. & E. 824, S. C.

[4] Bird *v.* Higginson, 2 A. & E. 696; 6 A. & E. 824; 4 N. & M. 506, S. C.; Thomas *v.* Fredericks, 10 Q. B. 775. See post, §§ 900—902, 946, 953, 954.

[5] Smith *v.* Smith, 2 Str. 955; Bunn *v.* Markham, 2 Marsh. 532; 2 M. & Gr. 691, n. *a*.

[6] Shower *v.* Pilck, 4 Ex. R. 478.

inter vivos is irrevocable, though made verbally or in writing without deed, if it be either accompanied by delivery of possession, or followed by some statement or act on the part of the donee testifying his acquiescence in the gift.[1] A similar gift, if made by deed, is complete without any delivery by the donor or acceptance by the donee, until disclaimer by the latter;[2] but such disclaimer may be by parol.[3] An assignment of chattels for a valuable consideration by way of mortgage will be binding upon the parties, though the instrument be not under seal, and though it be unaccompanied by any actual or symbolical delivery.[4]

§ 895. Another class of transactions, which, at common law, are in general required to be evidenced by deed, consists of contracts made, and acts done, by *corporations*.[5] The general rule of law, that a corporation aggregate cannot express its will or do any act except under seal, may be traced to a remote antiquity, and is founded on the assumption, that the concurrence of the whole body corporate in any particular act, can best be authenticated by the affixing of the corporate seal to the document relating to such act.[6] In short, the common seal has been termed, in the quaint phraseology of olden times, "the hand and mouth of the corporation."[7] This rule has been denounced in the United States as highly impolitic, and is now almost entirely superseded in practice;[8] but in England it still holds its ground,

[1] 1 Com. B. 381, n. *b*, & 2 M. & Gr. 691, n. *a*; cited by Parke, B., in Flory *v*. Denny, 7 Ex. R. 583; questioning Irons *v*. Smallpiece, 2 B. & A. 551.

[2] Id.; Siggers *v*. Evans, 5 E. & B. 367.

[3] Id.; Shepp. Touch. 285.

[4] Flory *v*. Denny, 7 Ex. R. 581.

[5] Arnold *v*. Mayor of Poole, 4 M. & Gr. 860; Mayor of Ludlow *v*. Charlton, 6 M. & W. 815; Church *v*. Imp. Gas Light & Coke Co., 6 A. & E. 861; Paine *v*. Strand Union, 8 Q. B. 326; Lamprell *v*. Billericay Union, 3 Ex. R. 283, 306. As to contracts made by the Metropolitan Board of Works, see 18 & 19 Vict., c. 120, § 149.

[6] Mayor of Ludlow *v*. Charlton, 6 M. & W. 823, per Rolfe, B.; Church *v*. Imp. Gas Light & Coke Co., 6 A. & E. 861.

[7] R. *v*. Bigg, 3 P. Wms. 423, cited by Tindal, C. J., in Gibson *v*. East India Co., 5 Bing. N. C. 269. As to when a corporation may adopt a private seal, see ante, § 128.

[8] In 2 Kent's Com. 289, it is said, "At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United

and affords opportunities to corporate bodies, by the aid of unscrupulous counsel, to commit from time to time the most startling frauds.

§ 896. From the earliest traceable periods the rule in question has, indeed, been subject to certain *exceptions*, which rest upon a principle of convenience, amounting almost to necessity,[1] and which relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from their nature *do not admit of delay*.[2] Thus, to borrow the language of Mr. Baron Rolfe, in a well-considered case,[3] "A corporation, it is said, which has a *head*, may give a personal command, and do small acts; as it may retain a servant. It may authorise another to drive away cattle, damage feasant, or make a distress or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters the head of the corporation seems, from the earliest times, to have been considered as delegated by the rest of the members to act for them."

§ 897. His lordship then proceeds to point out, that[4] "in modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on *trading speculations*; and where the nature of their constitution has been such as to render the *drawing of bills*, or the *constant*

States, in the case of the Bank of Columbia *v.* Patterson, 7 Cranch, 229, that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorised agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay." See also 6 A. & E. 837, 838, per Patteson, J.

[1] Church *v.* Imp. Gas Light & Coke Co., 6 A. & E. 861, per Lord Denman, cited by Rolfe, B., in Mayor of Ludlow *v.* Charlton, 6 M. & W. 822.

[2] Arnold *v.* Mayor of Poole, 4 M. & Gr. 895, per Tindal, C. J.; De Grave *v.* Mayor of Monmouth, 4 C. & P. 111.

[3] Mayor of Ludlow *v.* Charlton, 6 M. & W. 821. [4] Id.

making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held that they would imply in those, who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist." These observations are confined to *trading* companies, but several recent decisions seem to warrant the assumption that the rule may be now generally stated as applicable alike to *all corporations aggregate*, whenever the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created.[1]

§ 898. In accordance with the rule thus expounded, it has been held that assumpsit will lie against a gas company for meters sold to them,[2] and a like action is maintainable by them against the consumer, either for not accepting gas according to his agreement,[3] or for the price of gas supplied to him.[4] Actions of assumpsit have also been held to lie against the guardians of the poor of an union, who are constituted a corporation by the Act of 5 & 6 Will. 4, c. 69, s. 7, in one case for iron gates,[5] and in another for water-closets,[6] which had respectively been supplied under parol contracts for the union workhouse. So, a parol contract made by the directors of a chartered Navigation Company, by which they agreed to pay a person a certain salary in consideration of his going to Sydney and bringing home one of their ships, has been enforced as against the Company, the plaintiff having performed his part of the agreement.[7] And when the same Company had bought some ale for the use of the passengers

[1] Clarke v. Cuckfield Union, 1 Bail Ct. Cas. 85, 86, 89, per Wightman, J., in an elaborate argument.

[2] Beverley v. Lincoln Gas Light and Coke Co., 6 A. & E. 829; 2 N. & P. 283, S. C.

[3] Church v. Imp. Gas Light and Coke Co., 6 A. & E. 846; 3 N. & P. 35, S. C.

[4] City of London Gas Light and Coke Co. v. Nicholls, 2 C. & P. 365.

[5] Sanders v. St. Neot's Union, 8 Q. B. 810. But see Smart v. Guard. of Poor of West Ham Union, 10 Ex. R. 687.

[6] Clarke v. Cuckfield Union, 1 Bail Ct. Cas. 81. See Pauling v. London and North West. Rail. Co., 8 Ex. R. 867.

[7] Henderson v. Australian Royal Mail Steam Navig. Co., 5 E. & B. 409. See also Reuter v. Electric Telegraph Co., 6 E. & B. 341.

on board one of their steamvessels, and had paid for it, they were allowed to recover damages from the vendors on account of the ale being unfit for use, though the agreement for the purchase was not under seal.[1] But, on the other hand, a contract with a *copper* mining company for a supply by them of *iron* rails;[2] a contract with a water company for the supply to them of iron pipes;[3] a contract for erecting engines and machinery for a water company;[4] a contract with a railway company to execute extensive repairs on their permanent line of rails;[5] a contract with guardians of the poor to make a map of the rateable property of a parish in the union;[6] and a contract with guardians to do some extra work in building a poor-house,[7]—have each and all of them been held to relate to matters which were not of such frequent occurrence, or of so small importance, or so essentially necessary for the purposes for which the corporations were respectively instituted, as to be taken out of the general rule, which requires the contracts of corporations to be under seal;[8] and even before the East India Company ceased to be merchants, it was held, that the allowance by them of a retiring pension to a military officer could not be enforced in a court of law, unless it were granted by deed.[9]

§ 899. It has long since been determined that corporations may be liable in *tort* for the acts of their servants, though such servants be not authorised by any instrument under seal;[10] and

[1] Australian Royal Mail Steam Navig. Co. *v.* Marzetti, 11 Ex. R. 228.

[2] Copper Miners Co. *v.* Fox, 16 Q. B. 229.

[3] East London Waterworks Co. *v.* Bailey, 4 Bing. 283; 12 Moore, 532, S. C.; explained by Lord Denman in Church *v.* Imp. Gas Light and Coke Co., 6 A. & E. 860—862.

[4] Homersham *v.* Wolverhampton Waterworks Co., 6 Ex. R. 137.

[5] Digglo *v.* London and Blackwall Rail. Co., 5 Ex. R. 442.

[6] Paine *v.* Strand Union, 8 Q. B. 326.

[7] Lamprell *v.* Billericay Union, 3 Ex. R. 283.

[8] Church *v.* Imp. Gas Light and Coke Co., 6 A. & E. 860—862, per Lord Denman, explaining East London Wat. W. Co. *v.* Bailey, 4 Bing. 283; 12 Moore, 532, S. C. See also Paine *v.* Strand Union, 8 Q. B. 326.

[9] Gibson *v.* East India Co., 5 Bing. N. C. 262; 7 Scott, 74, S. C. See also Cox *v.* Midland Rail. Co., 3 Ex. R. 268; 5 Rail. Cas. 583, S. C.; and Cope *v.* Thames Haven Dock and Rail. Co., 3 Ex. R. 841.

[10] Eastern Counties Rail. Co. *v.* Broom, 6 Ex. R. 314; 6 Rail. Cas. 743,

the rule requiring corporations to act by deed will not protect them, either from an action of trover, where goods have been wrongfully taken by their agent,[1] or from an action for money had and received, where they have wrongfully possessed themselves of money belonging to the plaintiff.[2] This last exception rests on necessity; for, as a corporation would scarcely put their seal to a promise to return moneys wrongfully received by them, it follows that if a seal were necessary, the injured party would be without remedy. It further deserves notice that an action for use and occupation is clearly maintainable *by* a corporation,[3] and is probably maintainable *against* a corporation,[4] whenever the defendants have *actually* occupied the plaintiff's premises, and no demise under seal has been executed; but this doctrine seems to rest on the peculiar language and object of the statute enabling landlords to bring such a form of action,[5] and it certainly does not extend to cases of mere constructive holding.[6]

§ 900. In the application of the above rule, and its exceptions, the question has often being discussed, as to how far a distinction can be recognised between *executed* and *executory* contracts,[7] and the decisions on this subject are confessedly irreconcileable. No doubt, where the contract falls within one of the exceptions, and consequently, need not be under seal, the corporation may equally sue or be sued upon the parol agreement, whether it

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S. C.; Roe v. Birkenhead, Lancashire and Cheshire Junct. Rail. Co., 7 Ex. R. 36; 6 Rail. Cas. 795, S. C.; Stewart v. Anglo Californian Gold Mining Co., 18 Q. B. 736. See Stevens v. Midland Rail. Co., & Lander, 23 L. J., Ex., 328.

[1] Yarborough v. Bank of England, 16 East, 6.

[2] Hall v. Mayor of Swansea, 5 Q. B. 526.

[3] Mayor of Stafford v. Till, 4 Bing. 77; 12 J. B. Moore, 260, S. C.; Dean & Chapter of Rochester v. Pierce, 1 Camp. 466; Southwark Bridge Co. v. Sills, 2 C. & P. 371; Mayor of Carmarthen v. Lewis, 6 C. & P. 608. See Doe v. Bold, 11 Q. B. 127.

[4] Finlay v. Bristol & Exeter Rail. Co., 7 Ex. R. 409; 7 Rail. Cas. 449, S. C.; Lowe v. London & North West. Rail. Co., 7 Rail. Cas. 524; 18 Q. B. 632, S. C.

[5] 11 Geo. 2, c. 19, § 14.

[6] Finlay v. Bristol & Exeter Rail. Co., 7 Ex. R. 409; 7 Rail. Cas. 449, S. C.

[7] See ante, § 893, post, §§ 946, 953, 954.

be executed, or be merely executory;[1] but the question is, what says the law, where a parol contract, which should have been under seal, has been *executed* by the one side before action brought, so that the other has received the whole benefit of the consideration for which it bargained? For example, can a corporate body, after having actually received goods ordered by its servants, refuse to pay for them on the technical pretext that no contract under seal has been executed? The Court of Queen's Bench,—apparently shocked at the gross injustice that might be perpetrated were such a system of repudiation allowable, and, peradventure, bearing in mind the sage apothegm of a great judge of the last century, that corporations, having neither bodies to be kicked nor souls to be damned, are not wont to be over nice observers of either honour or honesty,—have, in accordance with morality, if not with law, decided this question in the negative on several occasions.

§ 901. Thus, where an action was brought against the guardians of an union for the price of some gates which had been erected at the poorhouse under a parol order, and it was objected for the defence that the order was not by deed, the Court overruled the objection, on the ground that it did not lie in the mouths of the defendants to take it, inasmuch as the work in question, after it was completed, had been adopted by them for purposes connected with the corporation.[2] On another occasion, Lord Denman, in a considered judgment, expressed himself as follows:—"To enforce an *executory* contract against a corporation, it might be necessary to show that it was by deed; but where the corporation have acted as upon an *executed* contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both

[1] Church *v.* Imp. Gas Light & Coke Co., 6 A. & E. 846; 3 N. & P. 35, S. C.; recognised in Gibson *v.* East India Co., 5 Bing. N. C. 271, and in Arnold *v.* Mayor of Poole, 4 M. & Gr. 895.

[2] Sanders *v.* St. Neot's Union, 8 Q. B. 810. See also Clarke *v.* Cuckfield Union, 1 Bail Ct. Cas. 81; Beverley *v.* Lincoln Gas Light & Coke Co., 6 A. & E. 829; De Grave *v.* Mayor of Monmouth, 4 C. & P. 111, per Lord Tenterden; Pauling *v.* London and North West. Rail. Co., 23 L. J., Ex., 105; 8 Ex. R. 867, S. C.

parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed; it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case."[1]

§ 902. Decisions and authorities, however, may be found which are wholly inconsistent with the law as thus propounded; for it has more than once been held by the Barons of the Exchequer, that a corporation is not precluded from relying on the absence of a seal, when works have been *executed* under a parol contract, even though such works have received the approval of the corporation, which has enjoyed the full benefit of them.[2] The judges of the Common Pleas, too, seem to have adopted the same rule; for where an attorney, who had been appointed, but not under seal, by the mayor and town council of a borough to conduct suits, brought an action against the corporation for his costs, they held that he could not recover.[3]

§ 903. The common law rule requiring corporations to contract by deed does not extend to such companies as are subject to the Companies Clauses Consolidation Act.[4] For § 97 of that statute expressly enacts, that "the powers which may be granted to any committee [of directors] to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows; that is to say, With respect to

[1] Doe *v.* Taniere, 12 Q. B. 1013, 1014. See also Henderson *v.* Australian Royal Mail Steam Navig. Co., 5 E. & B. 409; Australian Royal Mail Steam Navig. Co. *v.* Marzetti, 11 Ex. R. 228; Reuter *v.* Electric Telegraph Co., 6 E. & B. 341.

[2] Lamprell *v.* Billericay Union, 3 Ex. R. 307. See also Diggle *v.* London & Blackwall Rail. Co., 5 Ex. R. 442; Homersham *v.* Wolverhampton Waterworks Co., 6 Ex. R. 137; 6 Rail. Cas. 790, S. C.; Mayor of Ludlow *v.* Charlton, 6 M. & W. 815.

[3] Arnold *v.* Mayor of Poole, 4 M. & Gr. 860.

[4] 8 & 9 Vict., c. 16.

any contract, which, if made between private persons, would be by law required to be in writing and under seal, such committee, or the directors, may make such contracts on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same: With respect to any contract, which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same: With respect to any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same: And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought, had the same contracts been made between private persons only."

§ 904. Under this section it has been held, that the fact of sleepers having been furnished to a railway company, and actually received and used by them, in pursuance of a contract made with an agent of the company upon certain terms, afforded reasonable evidence whence a jury might infer that the directors had agreed on behalf of the company to accept the goods on those terms.[1]

§ 905. The contracts also of such joint-stock companies as are registered under the Act of 19 & 20 Vict., c. 47,[2] are not subject

[1] Pauling *v.* London & North Western Rail. Co., 8 Ex. R. 867.

[2] See as to the old law, 7 & 8 Vict., c. 110, §§ 44, 45, 46; and the 2nd Ed. of this work, §§ 905, 906, with the cases there cited.

to the common law rule just discussed, but they may be made in nearly the same manner as contracts under the Companies Clauses Consolidation Act.[1]

§ 906. It further deserves notice, that the memoranda of association, by which joint-stock companies are now incorporated, and the articles of association, by which the affairs of such companies may be regulated, are not required to be executed under seal; but after registration they become, by virtue of the Act of 1856, as binding as deeds on every shareholder, who has signed either

[1] 19 & 20 Vict., c. 47, § 41, enacts, that "contracts on behalf of any company registered under this Act may be made as follows; (that is to say,)

"(1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

"(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged;

"(3.) Any contract which if made between private persons would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be."

§ 42 enacts, that "any company registered under this Act may, by instrument or writing under their common seal, empower any person either generally or in respect of any specified matters, as their attorney, to execute deeds on their behalf in any place not situate in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, shall be binding on the company to the same extent as if it were under the common seal of the company."

§ 43 enacts, that "a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed, on behalf of any company registered under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the express or implied authority of the company."

the originals or even printed copies of them in the presence of a single attesting witness.[1]

§ 907. In order to authorise an *agent* to execute a deed for his principal, the authority must be given by an instrument under seal;[2] and as such an instrument, or power of attorney, *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal, it follows that the deed must be executed by the agent in the name and as the act of him who gave the power.[3] Neither can a parol ratification by the principal of a deed executed by his agent give validity to the deed, when the agent has not been authorised to act by an instrument under seal;[4] and it seems that evidence of the implied, if not of the express, recognition or adoption of the deed by the principal, will not, even as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact.[5]

§ 908. Proceeding now to a consideration of the documentary evidence which is rendered necessary by *statute law*, the first Act which arrests attention is the Companies Clauses Consolidation Act, 1845.[6] This statute enacts, in § 14, that, subject to the regulations therein and in the special Act contained, every shareholder in any company, to which the provisions of the general Act apply, may sell and transfer his shares in the undertaking, or his interest in the capital stock of the company; but every such *transfer* shall be by *deed* duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form stated below,[7] or to the like effect. It is

[1] 19 & 20 Vict., c. 47, §§ 7, 10, 11.

[2] Berkeley *v.* Hardy, 5 B. & C. 355; 8 D. & Ry. 102, S. C.; White *v.* Cuyler, 6 T. R. 176; Steiglitz *v.* Egginton, Holt, N. P. R. 141; Williams *v.* Walsby, 4 Esp. 220; Callaghan *v.* Pepper, 2 Ir. Eq. R. 399.

[3] Hunter *v.* Parker, 7 M. & W. 343, per Parke, B.

[4] Id.

[5] Lord Gosford *v.* Robb, 8 Ir. Law R., 217.

[6] 8 & 9 Vict., c. 16.

[7] "I —, of —, in consideration of the sum of —, paid to me by —, of —, do hereby transfer to the said —, — share [*or* shares] numbered — in the undertaking called 'The — Company' [*or* — pounds consolidated stock in the undertaking called 'The — Company,' standing (*or* part of the

remarkable, as illustrating the absence of uniformity in our efforts at legislation, that the transfer of shares under the Joint-Stock Companies Act, 1856, is not required to be by deed.[1]

§ 909. The next transaction which requires notice is the *sale* of a *ship*, or of any share therein. The Act which regulates these sales is the Merchant Shipping Act of 1854,[2] which, in § 55, enacts, that "a registered ship or any share therein, when disposed of to persons qualified to be owners of *British* ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the Form marked E. in the Schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferrer in the presence of and be attested by one or more witnesses." This enactment, like that contained in the repealed Act of 8 & 9 Vict., c. 89,[3] would seem to apply as well to an executory contract for the sale, as to the absolute sale, of a ship.[4] The present law, however, differs in several material respects from that which was formerly in force. In the first place it appears to render an actual bill of sale necessary, though under the old law any instrument in writing, which recited the certificate of registry, was sufficient.[5] Next, the bill of sale must now be executed by the transferrer himself, except under very special circumstances, when he is allowed to appoint an attorney by deed;[6] but formerly a ship might have been transferred by an agent acting under a parol

stock standing) in my name in the books of the Company], to hold unto the said —, his executors, administrators, and assigns [*or* successors and assigns], subject to the several conditions on which I held the same at the time of the execution hereof; and I the said — hereby agree to take the said share [*or* shares] [*or* stock], subject to the same conditions. As witness our hands and seals the — day of —."

[1] 19 & 20 Vict., c. 47, § 20, & Sch. (F). [2] 17 & 18 Vict., c. 104.

[3] § 34.

[4] See Duncan *v.* Tindal, 13 Com. B. 258; Hughes *v.* Morris, 21 L. J., Ch., 761; 2 De Gex, M. & Gord. 349, S. C.; M'Calmont *v.* Rankin, 2 De Gex, M. & Gord. 403.

[5] Hunter *v.* Parker, 7 M. & W. 343, 344, per Parke, B.

[6] See 17 & 18 Vict., c. 104, § 76, et seq., and Form N. in Sched. to Act.

authority.[1] Lastly, it is at least doubtful whether, since the 1st of May, 1855,[2] any description of vessel used in navigation, not propelled by oars,[3] can be sold without a bill of sale, though boats under fifteen tons burthen might, prior to that date, have been transferred by parol,[4] and though such vessels do not now require to be registered, if solely employed in river or coast navigation.[5]

§ 910. The Act to simplify the transfer of property[6] deserves a passing notice; for although that statute was extremely short-lived, it having been repealed within a year from its passing,[7] it has rendered a *deed* necessary in all cases of partitions, exchanges, assignments, or surrenders in writing, of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands,[8] provided the transfer has been effected between the *1st of January*[9] and the *1st of October*,[10] 1845.

§ 911. This Act was succeeded by 8 & 9 Vict. c. 106, which enacts in § 2, "that after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;" or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. § 3 of this statute further enacts, "that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a *partition* and an *exchange* of any tenements or hereditaments not being copyhold,—and a *lease*, required by law to be in writing, of any tenements or hereditaments,—and an *assignment of a*

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[1] Hunter *v.* Parker, 7 M. & W. 322.

[2] When the Merchant Shipping Act of 1854 came into operation.

[3] See § 2 of 17 & 18 Vict., c. 104, tit. Ship; and § 55.

[4] Benyon *v.* Cresswell, 12 Q. B. 899.

[5] § 19 of 17 & 18 Vict., c. 104.

[6] 7 & 8 Vict., c. 76.

[7] By 8 & 9 Vict., c. 106.

[8] 7 & 8 Vict., c. 76, §§ 3 & 4; Burton *v.* Reevell, 16 M. & W. 307; Doe *v.* Moffatt, 15 Q. B. 257.

[9] 7 & 8 Vict., c. 76, § 13.

[10] 8 & 9 Vict., c. 106, § 1.

chattel interest, not being copyhold, in any tenements or hereditaments,—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st of October, 1845, shall also be *void at law*, unless made by *deed*: Provided always that the said enactment, so far as the same relates to a release[1] or a surrender, shall not extend to Ireland."

§ 912. This last enactment, so far as it relates to feoffments, partitions, exchanges, assignments, and surrenders, is of little practical importance, since before the passing of the Act, such transfers were almost invariably effected by deed. With respect, however, to *leases* the statute will prove highly beneficial;[2] for by requiring all demises for a period exceeding three years to be under seal, it will gradually diminish, and at last dry up, that fruitful source of litigation, which sprung from the difficulty of distinguishing between an actual lease and an agreement for a lease under the old law. In future, if the instrument be not under seal, it will operate only as an agreement for a lease; that is, the party in possession of land under it will be a mere tenant at will, liable to become a tenant from year to year by the payment and acceptance of rent.[3]

§ 913. Although leases for any term exceeding three years are now void unless granted by deed, an equally formal instrument is not required for the purpose of confirming those leases, which are invalid by reason of some deviation from the terms of the power under which they were granted; for the recent Act of 13 & 14 Vict., c. 17, § 3, expressly enacts, that the *confirmation*, which shall suffice to establish the validity of any such defective lease, "may be by memorandum or note in writing signed by the

[1] This is obviously a misprint for "lease."

[2] The statute does not apply to agreements for letting tolls of turnpike roads under 3 Geo. 4, c. 126, §§ 55, 57; Shepherd *v.* Hodsman, 18 Q. B. 316.

[3] See further as to the operation of this Act, Davidson Concise Prec. of Convey. 50—71; Platt on Leases, passim. See also post, §§ 915, 916.

persons confirming and accepting respectively, or by some other persons by them respectively theunto lawfully authorised."

§ 914. Bearing in mind the alterations effected by the Acts just mentioned, we now come to the *Statute of Frauds*, passed in the reign of Charles II., the provisions of which Act have been extended to Ireland by 7 Will. 3, c. 12, and have also been enacted, generally in the same words, in nearly all the United States.[1] This celebrated statute we owe to the great lawyer, but indifferent statesman, Lord Nottingham, who appears to have been assisted in framing it by Sir Leoline Jenkins and Lord Hale;[2] yet notwithstanding these bright names, it is certainly drawn in so inartificial a manner as to confer little credit on the skill of the draftsmen; and if Lord Nottingham was justified, while speaking with parental pride of the principle of the measure, in declaring that it was an Act, every line of which was worth a subsidy,[3]—the present generation, who can contemplate the almost endless litigation which its ambiguous language has caused, may add with more truth, if not with more sincerity, that every line of it has cost a subsidy. The blame, however, which may justly be cast on the wording of the Act, must be converted into unqualified praise, if regard be had to the objects which it seeks to attain, and which it has, in fact, to a great extent attained.[4] It will then be seen that[5] the rules of evidence, contained in this statute, are, for the most part, well calculated for the exclusion of perjury, by requiring, in the cases there mentioned, some more satisfactory evidence than mere oral testimony affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they

[1] 29 Car. 2, c. 3; 4 Kent, Comm. 95, and note *b*, (4th ed.) The Civil Code of Louisiana, art. 2415, without adopting in terms the provisions of the Statute of Frauds, declares generally, that all verbal sales of immoveable property, or slaves, shall be void. 4 Kent, Comm. 450, note *a*, (4th ed.)

[2] 3 Campbell's Lives of the Chancellors, 418.

[3] R. North's Life of Guildford, 209.

[4] In Doe *v.* Harris, 8 A. & E. 12, Lord Denman speaks of the Statute of Frauds, as "one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution."

[5] Gr. Ev., § 262, almost verbatim.

did not previously possess.[1] Its policy is to impose such requisites upon private transfers of property, as without being hindrances to fair transactions may either be totally inconsistent with dishonest projects, or may tend to multiply the chances of detection.[2] The object of the present work will not admit of an extended consideration of the provisions of this statute; but will necessarily restrict us to a notice of the rules of evidence, which it has introduced.

§ 915. By this statute, all *leases*, estates, and interests in lands, whether of freehold or for terms of years, and whether certain or uncertain, which, prior to the 1st of January, 1845,[3] have been created by livery and seisin only,—that is, by mere matter in pais, without deed,[4]—or by parol, and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, are allowed only the force and effect of estates at will; except leases not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two-thirds of the improved value.[5] It seems to be now determined, though the point is not wholly free from doubt, that the above provisions of the statute are not applicable to *demises under seal;*[6] and consequently, that an indenture of lease

[1] 2 St. Ev. 472; Rann *v.* Hughes, 7 T. R. 350, n.; Barrell *v.* Trussell, 4 Taunt. 121.

[2] Roberts on Frauds, Pref. xxii.

[3] When 7 & 8 Vict., c. 76, came into operation. See ante, § 910.

[4] See per Patteson, J., and Lord Denman, in Cooch *v.* Goodman, 2 Q. B. 592, 597.

[5] 29 Car. 2, c. 3, § 1, enacts, that "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases, or estates, or any former law or usage, to the contrary notwithstanding." § 2 "excepts, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third-parts at the least of the full improved value of the thing demised." These provisions are enacted in § 1 of 7 Will. 3, c. 12, Ir.

[6] Aveline *v.* Whisson, 4 M. & Gr. 801; Shep. Touchstone by Preston,

for more than three years need not be signed. It has been said more than once, that the tenancy described in the statute as "*an estate at will*," must be construed as a tenancy from year to year;[1] but this is not strictly accurate; since a party who enters under an agreement void by the statute, is, in point of law, tenant at will for the first year, though, like any other tenant at will, he will be converted into a tenant from year to year, as soon as a yearly rent has been paid and accepted.[2] In both characters, too, he will be subject to such of the terms of the agreement, as are not inconsistent with the species of tenancy which the law under the circumstances creates;[3] and, therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation,[4] or that he shall pay his rent in advance,[5] he will be liable to an action for a breach of either of these terms, notwithstanding the agreement is made void by the statute.

§ 916. Although a parol lease for a longer period than the Act permits is inoperative as to its duration, still if a tenant holds under it during the entire period, he may quit *without notice* at the expiration of the term. An example will illustrate this proposition. Suppose a parol lease to have been granted for five years and a half, commencing at Michaelmas, 1850, at a specified annual rent. The tenant has entered, and till Michaelmas, 1851, was a mere tenant at will. He then paid his rent, and continued in possession, and thereby became tenant from year to year until Michaelmas, 1855, capable of quitting, or liable to be ejected, on giving or receiving a six months' notice that would expire on the

p. 56, n. 24; Cooch *v.* Goodman, 2 Q. B. 580, 597, 598; 2 G. & D. 159, S. C.; Cherry *v.* Heming, 4 Ex. R. 631. Contra, 2 Bl. Com. 306.

[1] Clayton *v.* Blakey, 8 T. R. 3, per Lord Kenyon; Berry *v.* Lindley, 3 M. & Gr. 512, per Coltman, J.; id. 514, per Maule, J.

[2] Richardson *v.* Gifford, 1 A. & E. 56, per Parke, J.; 3 M. & Gr. 512, n. *a* by reporter, and cases there cited; 2 Smith's Lead. C. 74—76.

[3] Berrey *v.* Lindley, 3 M. & Gr. 514, per Maule, J.; Doe *v.* Bell, 5 T. R. 471; Arden *v.* Sullivan, 14 Q. B. 832. See Tooker *v.* Smith, 1 H. & N. 732.

[4] Richardson *v.* Gifford, 1 A. & E. 56; 8 D. & R. 643, S. C. See Beale *v.* Sanders, 3 Bing. N. C. 850; 5 Scott, 58, S. C.; Arden *v.* Sullivan, 14 Q. B. 832.

[5] Lee *v.* Smith, 9 Ex. R. 662.

29th of September in any year. At Lady-day, 1856, however, when the whole period of five years and a half will have run out, either party will be at liberty to terminate the tenancy without any notice whatever.[1] The term[2] of three years for which a parol lease may be good, must be computed from the date of the agreement; and a term of three years to commence in futuro, will consequently not satisfy the statute.[3] If a parol lease is made, to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.[4]

§ 917.[5] By the *third* section of the same statute,[6] no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, in messuages, manors, lands, tenements, or hereditaments, could, prior to the first of January, 1845,[7] be *assigned, granted, or surrendered*, unless by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or his agent authorised by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal, as advowsons, rents, and the like, and interests in lands not in possession, as remainders and reversions for life or years, lying *in grant*, could not, and still cannot, be surrendered but by deed.[8] The effect of this section is not to dispense with

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[1] Berrey *v.* Lindley, 3 M. & Gr. 498, 511, 513, 514; Doe *v.* Stratton, 4 Bing. 446; 1 M. & P. 183, S. C.; Doe *v.* Moffatt, 15 Q. B. 257; Tress *v.* Savage, 23 L. J., Q. B., 339; 4 E. & B. 36, S. C.

[2] Gr. Ev., § 263, in part.

[3] Rawlins *v.* Turner, 1 Lord Raym. 736.

[4] Roberts on Frauds, 241—244.

[5] Gr. Ev., § 264, in part.

[6] See also 7 Will. 3, c. 12, § 1, Ir., to the like effect.

[7] When 7 & 8 Vict., c. 76, came into operation. See ante, §§ 910—912.

[8] Co. Lit. 337 b, 338 a; 2 Shep. Touchstone by Preston, p. 330; 1 Wms. Saund. 236 a; Lyon *v.* Reed, 13 M. & W. 303—305; ante, § 892.

any evidence, required by the common law; but to add to its provisions somewhat of security, by requiring a new and a more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by words only, some note in writing, duly signed, was by the statute made essential to a valid surrender.[1]

§ 918. In interpreting this section, it will be observed, that it does not contain, like the first two sections of the Act, any exception in favour of leases not exceeding the term of three years; and, consequently, it has been held to exclude alike parol assignments and parol surrenders of mere leases from year to year, though such leases have been created by verbal agreement.[2] It seems, also, that a parol agreement by a lessee for the transfer of his interest, in a term not exceeding three years, which is intended to take effect as an *assignment*, and is invalid as such, cannot operate as an *underlease*.[3] If, however, both parties *intend* to create the relation of landlord and tenant, the mere fact of the parol demise passing all the lessor's interest in the premises will not prevent it from operating as a lease, at least for some purposes.[4] The lessor, therefore, under these circumstances, may maintain an action for use and occupation during the entire term, even should the lessee quit the premises before its expiration;[5] and this, too, although the lessor, in consequence of having no reversion, cannot distrain for the rent in arrear.[6]

§ 919. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a pre-

[1] Roberts on Frauds, 248.

[2] Botting v. Martin, 1 Camp. 319, per M'Donald, C. B.; Mollett v. Brayne, 2 Camp. 103, per Lord Ellenborough; Thomson v. Wilson, 2 Stark. R. 379, per id. See Doe v. Wells, 10 A. & E. 435—437.

[3] Barrett v. Rolfe, 14 M. & W. 348, questioning Poultney v. Holmes, 1 Stra. 405.

[4] Pollock v. Stacy, 9 Q. B. 1033, upholding Poultney v. Holmes, 1 Stra. 405.

[5] Id.

[6] Parmenter v. Webber, 8 Taunt. 593; Smith v. Mapleback, 1 T. R. 441.

cise meaning. Its most obvious application is "to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor."[1] In all these cases no question of *intention* can arise. The surrender is not the result of intention, but is the act of the law, and it takes place independent, and even in spite, of intention the most express.[2]

§ 920. Neither is it material, whether the interest taken by the surrenderor under the new arrangement, be or be not equivalent to that which he enjoyed under the surrendered term; and, therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new demise for a shorter period, this will amount to a surrender of his original lease.[3] At one time it was thought that a tenancy under a lease would be surrendered by operation of law, if the parties were to make a verbal agree-

[1] Lyon v. Reed, 13 M. & W. 306, per Parke, B. [2] Id. 306, 307, per id.

[3] Mellow v. May, Moore, 636; recognised by Holroyd, J., in Hamerton v. Stead, 3 B. & C. 482, 483, and by Lefroy, B., in Lynch v. Lynch, 6 Ir. Law R. 142; 1 Wms. Saund. 236 c.

ment, for a sufficient consideration, that instead of the existing term there should be a tenancy from year to year at a different rent, or even a tenancy at will.[1] This doctrine, however, has been much shaken of late years, and the better opinion now is, that nothing short of an express demise will operate as a surrender of an existing lease.[2] Still, it is not necessary that the new demise should in all events be incapable of being defeated. For example, if a lessee were to accept *in accordance with his contract* a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass ab initio the actual interest contracted for, though that interest would be liable to be defeated at some future period.[3]

§ 921. On the other hand, the acceptance of a *void* lease, which creates no new estate whatever,[4] or even the acceptance of a *voidable* lease, which being afterwards made void *contrary to the intention* of the parties, does not pass an interest *according to the contract*, will not operate as a surrender of a former lease.[5] Nor will it make any difference in the consideration of this question, whether the surrender be *express* or *implied*; for as the Court of Queen's Bench justly observed on one occasion:[6] "In the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such

[1] See cases cited in last note.

[2] Foquet *v.* Moor, 7 Ex. R. 870; Crowley *v.* Vitty, id. 319.

[3] Roe *v.* Archbishop of York, 6 East, 102; Doe *v.* Bridges, 1 B. & Ad. 847, 856; Doe *v.* Poole, 11 Q. B. 716, 723; Fulmerston *v.* Steward, Plowd. 107 a, per Bromley, C. J.; Co. Lit. 45 a; Lloyd *v.* Gregory, Cro. Car. 501; Whitley *v.* Gough, Dyer, 140—146.

[4] Roe *v.* Archbishop of York, 6 East, 86; explained by Abbott, C. J., in Hamerton *v.* Stead, 3 B. & C. 481, 482; Lynch *v.* Lynch, 6 Ir. Law R. 142, per Lefroy, B.; Wilson *v.* Sewell, 4 Burr. 1980; Davison *v.* Stanley, id. 2213, per Lord Mansfield.

[5] Doe *v.* Poole, 11 Q. B. 713; Doe *v.* Courtenay, id. 702.

[6] Doe *v.* Courtenay, 11 Q. B. 712; overruling Doe *v.* Forwood, 3 Q. B. 627.

instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void, in case the grant should be made void."

§ 922. Again, the mere fact of a tenant entering into an agreement to *purchase* the estate will not work a surrender of his tenancy by operation of law; because such a contract contains an implied condition that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not.[1] If, however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant, from its date, was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate as a surrender of the former interest.[2] So, an agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law.[3]

§ 923.[4] The simple *cancellation* of a lease cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and therefore, a surrender by cancellation, which is but a sign, is also taken away at law; though a symbolical surrender may perhaps be still recognised in Chancery, as the basis of relief.[5] It

[1] Doe v. Stanion, 1 M. & W. 695, 701; Tarte v. Darby, 15 M. & W. 601.

[2] 1 M. & W. 701.

[3] Donellan v. Read, 3 B. & Ad. 905; Lambert v. Norris, 2 M. & W. 335.

[4] Gr. Ev., § 265, slightly.

[5] Magennis v. MacCullough, Gilb. Eq. R. 236; Roe v. Archbp. of York, 6 East, 86, 101; Wootley v. Gregory, 2 Y. & Jer. 536; Bolton v. Bishop of Carlisle, 2 H. Bl. 263, 264; Doe v. Thomas, 9 B. & C. 288; 4 M. & R. 218, S. C.; Walker v. Richardson, 2 M. & W. 882; Natchbolt v. Porter, 2 Vern. 112; 4 Cruise's Dig. 85, White's Ed. Tit. 32, ch. 7, §§ 5,

would seem that this rule equally applies, whether the cancelled deed relates to things lying in livery, or to those which lie only in grant.[1] Neither will the fact of the deed being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences have happened, which might account for, or excuse, the non-production of the written surrender.[2]

§ 924. Though the doctrine of surrender by operation of law was originally confined to cases where the tenant accepted from his lessor a new interest, inconsistent with that which he previously had, it has by modern decisions been considerably extended, and is now applied, not only to the case where the second lease is granted to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger,[3] but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and third party concur in such act, and the former *actually gives up possession* in consequence of it.[4] Thus, a demise by the lessor to a stranger, with the assent of the lessee, if coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, at least if it be merely a chattel interest.

6, 7; 4 Kent, Com. 104; Roberts on Frauds, 251, 252; id. 248, 249; Holbrook v. Tirrell, 9 Pick. 105.

[1] Bolton v. Bp. of Carlisle, 2 H. Bl. 263, 264; Walker v. Richardson, 2 M. & W. 892.

[2] Doe v. Thomas, 9 B. & C. 288, 298—300; 4 M. & Ry. 218, S. C.; Walker v. Richardson, 2 M. & W. 882; ante, § 120.

[3] Shep. Touchst. 301; Hamerton v. Stead, 3 B. & C. 478.

[4] Thomas v. Cook, 2 Stark. R. 408; 2 B. & A. 119, S. C.; Stone v. Whiting, 2 Stark. R. 235; Dodd v. Acklom, 6 M. & Gr. 672; Lynch v. Lynch, 6 Ir. Law R. 131; Walker v. Richardson, 2 M. & W. 882; Davison v. Gent, 26 L. J., Ex., 122; 1 H. & N. 744, S. C.; Grimman v. Legge, 8 B. & C. 324; 2 M. & R. 438, S. C.; Bees v. Williams, 2 C. M. & R. 581; Graham v. Whichelo, 1 Cr. & Mee. 188; Reeve v. Bird, 1 C. M. & R. 31; 4 Tyr. 612, S. C.; Hall v. Burgess, 5 B. & C. 332; Nickells v. Atherstone, 10 Q. B. 944; M'Donnell v. Pope, 9 Hare, 705.

[5] Cases cited in last note. In Doe v. Wood, 14 M. & W. 682, M., tenant

Whether the same doctrine would apply to a case where the former lessee had a freehold interest may admit of some doubt. In Lynch *v.* Lynch[1] the Irish Court of Exchequer held that it would, but that decision has been much shaken, if not overruled, by Lord St. Leonards, in the case of Creagh *v.* Blood.[2] Although a parol licence to quit, even when followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest;[3] yet if the tenant, in pursuance of such a licence, gives up possession, and the landlord accepts it, the licence, coupled with the change of possession, will amount to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession.[4]

§ 925. It is true that this doctrine has been questioned by Lord Wensleydale, who has suggested that the cases on which it rests may be supported on the ground, that the occupation of the premises by the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or compensation for use and occupation during the continuance of that occupation."[5] Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground;[6] but in Thomas *v.* Cook,[7] which is the leading authority on the subject, this point was neither suggested in argument, nor alluded to by the Court; and in Lynch *v.* Lynch,[8] which

from year to year to B., died, leaving his widow in possession. A., some time after, took out administration, but the widow continued in possession, paying rent to B. within A.'s knowledge, and A. not objecting. Held, that these facts did not amount to a surrender on A.'s part by operation of law, and, consequently, that A., on proof of M.'s tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

[1] 6 Ir. Law R. 131.

[2] 3 Jones & Lat. 133, 161.

[3] Mollett *v.* Brayne, 2 Camp. 103, per Lord Ellenborough. See also Doe *v.* Milward, 3 M. & W. 328, and Johnstone *v.* Huddlestone, 4 B. & C. 922.

[4] Grimman *v.* Legge, 8 B. & C. 324; 2 M. & R. 438, S. C.; Dodd *v.* Acklom, 6 M. & Gr. 672; Whitehead *v.* Clifford, 5 Taunt. 518. See Cannan *v.* Hartley, 19 L. J., C. P., 323; 9 Com. B. 634, S. C.

[5] Lyon *v.* Reed, 13 M. & W. 309, 310.

[6] Gore *v.* Wright, 8 A. & E. 118; 3 N. & P. 243, S. C.

[7] 2 Stark. R. 408; 2 B. & A. 119, S. C.

[8] 6 Ir. Law R. 131.

was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their consent, had been substituted in their place by the landlord. Moreover, the Court of Queen's Bench,[1] and, very recently, the Court of Exchequer also,[2] have declared their dissent from the line of argument advanced by Lord Wensleydale, and have confirmed the rule laid down in Thomas v. Cook.

§ 926. On the whole it is submitted that this rule is good law; and that confined, as it is, to cases where an actual, and, consequently, a notorious shifting of possession has occurred, no real danger need be apprehended from its continuance. Its adoption, where reversions or incorporeal hereditaments are disposed of, which pass only by deed, or its extension to cases where corporeal estates are dealt with by the consent of the tenant, but where no actual change of possession has taken place, would certainly let in all the dangers for avoiding which the statute was passed; and here Lord Wensleydale is quite right in observing, that if this were the law, it would very seriously affect titles to long terms of years; mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person.[3] However, as this is not the law at present,[4] and as little reason exists for supposing that it will ever become the law, nothing further need be said on the subject.

§ 927. A surrender by operation of law may also be effected under the provisions of particular Acts of Parliament. For instance, the Bankrupt Law Consolidation Act empowers a bankrupt lessee to relieve himself from all responsibility under his

[1] Nickells v. Atherstone, 10 Q. B. 944, 950, 951.

[2] Davison v. Gent, 26 L. J., Ex., 122; 1 H. & N. 744, S. C.

[3] Lyon v. Reed, 13 M. & W. 309.

[4] Id. 310, as to estates lying in grant; Doe v. Johnston, M'Clel. & Y. 141, as to the assent of the tenant, when not coupled with change of possession; recognised in Dodd v. Acklom, 6 M. & Gr. 679, 682. In Walker v. Richardson, 2 M. & W. 882, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

lease, by simply *delivering it up*[1] to the landlord within fourteen days after notice given to him that his assignees decline it; and if the assignees do not elect whether they will decline or accept the lease, they will be compelled by the Court to do so, and in case they decline the same, to deliver it to the landlord. The same rule prevails with regard to agreements for a lease, and to agreements for the purchase of any estate or interest in land.[2]

[1] It seems, though the point is not without doubt, that where the bankrupt holds under a demise not in writing, the offering possession is a delivery within the statute. Slack *v.* Sharpe, 8 A. & E. 366; 3 N. & P. 390, S. C.; Briggs *v.* Sowry, 8 M. & W. 729, 739, 741.

[2] 12 & 13 Vict. c. 106, § 145, enacts, that "if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee, or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land, or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land or conveyance, or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the Court, and the Court may order them to elect, and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit."

§ 146 enacts, that "if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, may apply to the Court, and the Court may thereupon order them to deliver up the agreement, and the possession of the premises, to the vendor or person claiming under him, or may make such order therein as such Court shall think fit."

Somewhat similar provisions are also contained in the Acts respecting *Insolvent Debtors,*[1] and in the "Irish Bankrupt and Insolvent Act, 1857."[2] So, under the Act for regulating Benefit Building Societies, the trustees of any such society may indorse on any mortgage given to them by a member a receipt in full, and such receipt will have the effect of vacating the security, and of vesting the property comprised therein in the party entitled to the equity of redemption, without any re-conveyance.[3]

§ 928. With respect to *assignments by operation of law,* these may be effected in a variety of ways. For instance, when a lessor dies intestate, the reversion vests in his heir-at-law, and when a lessee dies intestate, the lease vests in his administrator, by operation of law. Nay, as against himself, even an executor de son tort may be treated as the assignee of a lease; and in all these cases, when an action is brought against the heir, or administrator, or executor de son tort, it will be sufficient to charge in the declaration that the reversion or lease respectively came to the defendant "by assignment thereof then made."[4] So, on a woman's marriage her chattels real may be said to be assigned to her husband by operation of law. When any person is adjudged a *bankrupt,* his

[1] 1 & 2 Vict. c. 110, § 50, enacts, that "in all cases in which any such prisoner (that is, any person imprisoned for debt, who has petitioned the Insolvent Debtors' Court) shall be entitled to any lease or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereof, as part of such prisoner's estate and effects, the said prisoner shall not be, or be deemed to be, liable to pay any subsequent rent, to which his discharge, adjudicated according to this Act, may not apply, nor be in any manner sued after such acceptance in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained: Provided that in all such cases as aforesaid it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the said assignee or assignees shall decline, upon his or their being required so to do, to determine whether he or they will or will not accept such lease or agreement for a lease, to apply to the said Court, praying that he or they may either so accept the same, *or deliver up such lease* or agreement for a lease, and the possession of the premises demised or intended to be demised; and the said Court shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties."

[2] 20 & 21 Vict., c. 60, §§ 271, 272. [3] 6 & 7 Will. 4, c. 32, § 5.

[4] Paull *v.* Simpson, 9 Q. B. 365; Derisley *v.* Custance, 4 T. R. 75.

real and personal estate,[1] both present and future,[2] becomes vested in his assignees by virtue of their appointment, without any deed of assignment or conveyance; and on the death or removal of any such assignees, and the appointment of others in their stead, a similar vesting takes place.[3] So, when a trader, being unable to meet his engagements, petitions the Court of Bankruptcy for protection from process, and his creditors agree to his proposal for a compromise, all his estate and effects vest from the date of the Court's approval of such agreement in the official assignee, as fully as if he were an assignee under any bankruptcy.[4] So, also, the Act for facilitating arrangements between debtors and creditors,[5] which enables an insolvent debtor, though he be not a trader, to petition the Court of Bankruptcy to carry into effect any composition to which his creditors have agreed, enacts in § 8, that, from the date of filing the agreement, all the debtor's estate and effects shall vest, without any deed, in the trustee who is appointed, as fully as if he were an assignee under the statutes relating to bankruptcy. The Acts, too, which enable certain insolvent debtors to petition the Insolvent Debtors' Court, or the County Courts, to protect them from process,[6] as also the general Insolvent Debtors' Act,[7] contain similar provisions; and it is worthy of observation, that under the last-named Act, the property does not revest in the insolvent on his being discharged without adjudication by the default or consent of his creditors.[8] It only remains to add, that a parol assignment by a sheriff of leasehold premises, taken in execution under a fieri facias, is void at law, though the assignee has entered and paid rent to the head landlord; and, consequently, the execution debtor may still recover the premises in

[1] As to what causes of action do not pass to the assignees, see Stanton *v.* Collier, 3 E. & B. 274 ; Beckham *v.* Drake, 2 H. of L. Cas. 579 ; Rogers *v.* Spence, 12 Cl. & Fin. 700.

[2] See Herbert *v.* Sayer, 5 Q. B. 965 ; Jackson *v.* Burnham, 8 Ex. R. 173.

[3] 12 & 13 Vict., c. 106, §§ 141, 142. See as to the Irish law, 20 & 21 Vict., c. 60, §§ 267, 268.

[4] 12 & 13 Vict., c. 106, §§ 211—218.

[5] 7 & 8 Vict., c. 70.

[6] 5 & 6 Vict., c. 116, §§ 1, 7 ; 7 & 8 Vict., c. 96, §§ 4, 10 ; 10 & 11 Vict., c. 102, §§ 4, 6, 8.

[7] 1 & 2 Vict., c. 110, §§ 37, 45.

[8] Kernot *v.* Pittis, 2 E. & B. 406, 421 ; overruling Grange *v.* Trickett, id. 395.

an action of ejectment against the assignee,[1] unless the latter pleads the facts by way of defence on equitable grounds,[2] in which event he may possibly be enabled to defeat his opponent.

§ 929.[3] The Statute of Frauds further requires that the declaration or creation of *trusts* of lands shall be manifested by some writing, signed by the party, "who is by law enabled to declare such trust;"[4] and that all grants and assignments of any such trust shall also be in writing, signed in the same manner.[5] The statute does not require that the trust itself should be created by writing; but only that it should be manifested by writing; plainly meaning that documentary evidence should be forthcoming, to prove first the existence, and next the nature of the trust. A letter acknowledging the trust, and à fortiori, an admission in an answer in Chancery, has therefore been deemed sufficient to satisfy the statute.[6]

§ 930.[7] *Resulting trusts*, or those which arise by implication of

[1] Doe *v.* Jones, 9 M. & W. 372; 1 Dowl. N. S. 352, S. C.

[2] Under 17 & 18 Vict., c. 125, § 83.

[3] Gr. Ev., § 266, in part.

[4] These words refer to the *beneficial*, and not to the mere *legal* owner of the estate. Tierney *v.* Wood, 19 Beav. 330.

[5] 29 Car. 2, c. 3, § 7, enacts, that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

§ 8 provides, that "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

§ 9 enacts, that "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect." See the corresponding Irish Act of 7 Will. 3, c. 12, §§ 10, 11, 12.

[6] Forster *v.* Hale, 3 Ves. 696, 707, per Lord Alvanley; Randall *v.* Morgan, 12 Ves. 67; Roberts on Frauds, 95; 3 Sugden, V. & P. 252; 4 Kent, Com. 305.

[7] Gr. Ev., § 266, in part.

law, are specially excepted from the operation of the Act.[1] Trusts of this sort arise in three cases. First, where the estate is purchased in the name of one person, but the purchase-money is paid by another;[2] and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name, or in several, jointly, or successive; but in all cases the trust will result to the man who advances the purchase-money,[3] unless such a resulting trust would break in upon the policy of some statute,[4] or unless the purchase be effected by a father in the name of an unprovisioned child, legitimate, or illegitimate,[5] or in the joint names of such child and another person.[6] In this case of the purchase by a father, the trust will not be deemed a resulting trust for him, but a gift or advancement for the child; because a father is bound in conscience to provide for his child.[7] Resulting trusts will arise, secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and thirdly, in cases of fraud.[8] Other divisions have been suggested;[9] but they all seem reducible to these three heads. In all these cases it appears now to be generally conceded, that parol evidence, though received with great caution, and not deemed sufficient unless of a clear character,[10] is admissible to establish the collateral facts (not contradictory to the deed, unless in the case of fraud), from which a trust may legally result; and that it makes no difference as to its

[1] See note 5 in last page.

[2] Lloyd *v.* Spillet, 2 Atk. 150, per Lord Hardwicke.

[3] Dyer *v.* Dyer, Watk. Copyh. 216, per Eyre, C. B.; 3 Sugden, V. & P. 255, 256; Wray *v.* Steele, 2 Ves. & Bea. 388; Baxter *v.* Brown, 7 M. & Gr. 215.

[4] Ex parte Houghton, 17 Ves. 251; Redington *v.* Redington, 3 Ridg. P. C. 106.

[5] Beckford *v.* Beckford, Lofft, 490; 3 Sugden, V. & P. 262.

[6] Lamplugh *v.* Lamplugh, 1 P. Wms. 112.

[7] 3 Sugden, V. & P. 262.

[8] Lloyd *v.* Spillet, 2 Atk. 150, per Lord Hardwicke.

[9] 1 Lomax Dig. 200.

[10] Wilkins *v.* Stephens, 1 Y. & Col., Ch. C., 431; Groves *v.* Groves, 3 Y. & Jer. 170.

admissibility whether the nominal purchaser be living or dead.[1] It has, indeed, been doubted whether parol evidence is admissible against the answer of the trustee denying the trust;[2] but no good reason can be given for entertaining such a doubt.[3] As a resulting trust may be established by parol evidence, it may also, notwithstanding the statute, be rebutted by the same species of proof; and, therefore, parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially.[4]

§ 931. § 4 of the same Statute,[5]—which, like § 1, as before stated,[6] would seem to be inapplicable to deeds,[7]—enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the *agreement*, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.[8]

§ 932. § 17[9] also enacts, that no contract for the sale of goods,

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[1] 3 Sugden, V. & P. 257—260; 2 Story, Eq. Juris., § 1201, n.; Lench v. Lench, 10 Ves. 517; 3 Law Mag. 131—139; 4 Kent, Com. 305; Boyd v. M'Lean, 1 Johns., Ch. R., 582; Pritchard v. Brown, 4 N. Hamp. 307; Goodwin v. Hubbard, 15 Mass. 218, note by Mr. Rand.

[2] 3 Sugden, V. & P. 256, 257.

[3] 3 Law Mag. 136—138; Bartlett v. Pickersgill, 4 East, 577, n., per Lord Keeper Henley.

[4] 3 Sugden, V. & P. 260; Edwards v. Edwards, 2 You. & Col., Ex. R., 123; Brady v. Cubitt, 1 Doug. 31, 39; Goodright v. Hodges, Watk. Copyh. 227; 2 East, 534, n.

[5] § 7 of 7 Will. 3, c. 12, Ir., corresponds with this section.

[6] Ante, § 915.

[7] Cherry v. Heming, 4 Ex. R. 631.

[8] As to the meaning of these last words, see Norris v. Cooke, 30 Law Times, 224, in Ir. Ex.

[9] § 21 of 7 Will. 3, c. 12, Ir., corresponds with this section.

wares, or merchandise, for the *price* of ten pounds or upwards, shall be good, unless the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless "some note or memorandum in writing of the said *bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." This last enactment is extended by Lord Tenterden's Act,[1] "to all contracts for the sale of goods of the *value* of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

§ 933. Though the language of § 4 relating to sales of lands, varies in some trifling respects from that used in § 17 respecting sales of goods, the meaning is substantially the same in both sections;[2] and in order to satisfy either, the *consideration* for the *agreement* in the one case, and for the *bargain*[3] in the other, must,—except in the case of special promises made by one person to answer for the debt, default, or miscarriage of another,[4]—appear expressly or impliedly in the writing signed by the party to be charged. This rule applies, not only to bargains for the sale of goods, to agreements upon consideration of marriage,[5] to contracts for the sale of lands, and to agreements not to be performed within a year;[6] but also to special promises made by executors or administrators to answer damages out of their own

[1] 9 Geo. 4, c. 14, § 7. This Act also extends the similar enactment contained in § 21 of 7 Will. 3, c. 12, Ir.

[2] Kenworthy *v.* Schofield, 2 B. & C. 947, per Bayley, J.

[3] Egerton *v.* Mathews, 6 East, 307, may appear at variance with this rule, but the bargain there, like all bargains for the purchase of goods, imported consideration on the face of it. See per Park, J., in Jenkins *v.* Reynolds, 3 B. & B. 21; and Hunt *v.* Adams, 5 Mass. 360, 361.

[4] 19 & 20 Vict., c. 97, § 3, cited post, § 941.

[5] See Saunders *v.* Cramer, 3 Dru. & War. 87.

[6] Lees *v.* Whitcomb, 5 Bing. 34; 2 M. & P. 86, S. C.; Sykes *v.* Dixon, 9 A. & E. 693; 1 P. & D. 463, S. C.; Sweet *v.* Lee, 3 M. & Gr. 466.

estate. The judges have established this doctrine with the view of effectuating the object of the statute; but those who have watched its operation cannot fail to have observed, that instead of preventing, it has increased to a great extent, the commission of fraud. Many of the States of America,[1] influenced by these considerations, have repudiated the rule as highly impolitic; and hopes may reasonably be entertained that, ere long, the Legislature of this country will adopt similar views.

§ 934. At present, however, the rule prevails in full force both in England and in Ireland, the only recognised qualification of it being that the consideration need not be stated on the face of the written memorandum in express terms; but that it will suffice if it can be collected, not indeed by mere conjecture however plausible,[2] but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.[3]

§ 935. Before leaving the subject of the consideration for a promise, it may be observed generally, that whether it be express or implied, it must move from the plaintiff, and be such as he has the means of performing or causing to be performed; and moreover, it must not be contaminated with any illegal, fraudulent, or

[1] For example, the rule was rejected in Massachusetts,* by the whole Court, upon great consideration, Packard v. Richardson, 17 Mass. 122, and this decision has been upheld by the Legislature of that State; the revised stat. c. 74, § 2, providing that the consideration of the promise, contract, or agreement, need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence. So the rule is rejected in Maine, Levy v. Merrill, 4 Greenl. 180; in Connecticut, Sage v. Wilcox, 6 Conn. 81; in New Jersey, Buckley v. Beardsley, 2 South. 570; in North Carolina, Miller v. Irvine, 1 Dev. & Bat. 103; and in South Carolina, Fyler v. Givens, Riley's Law Cas. 56, 62. See also Violet v. Patton, 5 Cranch, 142; Taylor v. Ross, 3 Yerg. 330; 3 Kent, Com. 122.

[2] Hawes v. Armstrong, 1 Bing. N. C. 765, 766, per Tindal, C. J.; James v. Williams, 5 B. & Ad. 1109, per Patteson, J.; Raikes v. Todd, 8 A. & E. 855, 856, per Lord Denman.

[3] Joint v. Mortyn, 2 Fox & Smith, 4; Saunders v. Cramer, 3 Dru. & War. 87; Price v. Richardson, 15 M. & W. 540; Caballero v. Slater, 14 Com. B. 300.

* Gr. Ev., § 268, n.

immoral transaction, or contravene any rule of the common or statute law; but subject to these restrictions, any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or disadvantage sustained by the plaintiff, however small may be the benefit on the one hand, or the inconvenience on the other, is a sufficient consideration, if such act be performed, or such inconvenience be suffered, by the plaintiff, with the consent, express or implied, of the defendant, or in the language of pleading, at his special instance and request.[1]

§ 936. It is further essential to the validity of the written document, that the general terms of the contract,[2] and the promise,[3] should be stated therein, either directly or by reference;[4] but any memorandum will suffice, which, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a man undertakes in writing to purchase a particular article at a named price, this will satisfy the statute, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.[5] Again, if a party agrees to pay rent for a certain farm at a specified sum per acre,[6] or, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month, or even to liquidate his *debt*, the written memorandum need not specify the number of the acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry.[7] If it

[1] 1 Selw. N. P. 46; 2 Wms. Saund. 137 g—137 k, and cases there collected.

[2] Archer *v.* Baynes, 5 Ex. R. 625; Wood *v.* Midgley, 5 De Gex, M. & Gord. 41.

[3] Carroll *v.* Cowell, 1 Jebb & Sym. 43; Morgan *v.* Sykes, cited in argument in Coats *v.* Chaplin, 3 Q. B. 486.

[4] "I admit that an agreement is not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject matter of the contract, the consideration, and the promise," per Tindal, C. J., in Laythoarp *v.* Bryant, 2 Bing. N. C. 742.

[5] Sarl *v.* Bourdillon, 26 L. J., C. P., 78; 1 Com. B., N. S., 188, S. C.

[6] Shannon *v.* Bradstreet, 1 Scho. & Lef. 73, per Lord Redesdale.

[7] Bateman *v.* Phillips, 15 East, 272; Shortrede *v.* Cheek, 1 A. & E. 58, 60; Bleakley *v.* Smith, 11 Sim. 150.

be contended, that in the last instance given the memorandum is insufficient, as two or more debts may be owing from the third party, and it does not appear to which of these the writing applies, the answer is clear;—namely, that the Court will not presume the existence of more debts than one, but will call upon the party impeaching the document to furnish proof of that fact, and consequently, in the absence of such proof, the maxim, de non apparentibus et de non existentibus eadem est ratio, will be held to apply.[1] Again, the omission of the particular mode[2] or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale;[3] and a written order for goods "on moderate terms" will satisfy the statute,[4] though, if a specific price be agreed upon, it must be mentioned in the contract.[5]

§ 936 A. The names of both contracting parties must also be collected from the memorandum,[6] though on this point the Courts show little inclination to enforce any strict rule. In a recent case, where the defendant, having purchased various articles in the plaintiff's shop, signed his name and address in the "Order book," at the head of an entry which specified the articles and the prices, the statute was held to be satisfied, as the plaintiff's name was printed on the fly-leaf of the book, and the defendant might have seen it had he thought fit to look for it.[7]

§ 937.[8] The written evidence, required by this and similar statutes, need not be comprised in a single document, or be drawn up in any particular form; but it will suffice, if the contract can

[1] Shelton v. Braithwaite, 7 M. & W. 437, 438; Shortrede v. Cheek, 1 A. & E. 57; Dobell v. Hutchinson, 3 A. & E. 371; Powell v. Dillon, 2 Ball & Beat. 420; Spickernell v. Hotham, 1 Kay, 669.

[2] Sarl v. Bourdillon, 26 L. J., C. P., 78; 1 Com. B., N. S., 188, S. C.

[3] Valpy v. Gibson, 4 Com. B. 864, per Wilde, C. J.

[4] Ashcroft v. Morrin, 4 M. & Gr. 450.

[5] Elmore v. Kingscote, 5 B. & C. 583; 8 D. & R. 343, S. C.; Goodman v. Griffiths, 1 H. & N. 574.

[6] Champion v. Plummer, 1 New R. 252; Warner v. Willington, 3 Drewry, 523; Wheeler v. Collier, M. & M. 125, per Lord Tenterden; Boyce v. Green, Batty, R. 608.

[7] Sarl v. Bourdillon, 26 L. J., C. P., 78; 1 Com. B., N. S., 188.

[8] Gr. Ev., § 268, in part.

be *plainly made out in all its terms from any writings* of the party, or even from his *correspondence*.[1] Nay, a signed letter will be sufficient, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognises any writing which does contain them;[2] for, in such case the well-known maxim of law, "verba illata inesse videntur," will be held to apply.[3] A letter, however, which, instead of ratifying, repudiates the written but unsigned contract relied on, will of course not satisfy the requirements of the statute.[4] The entire contract, too, must be collected from the *writings*; verbal testimony not being admissible to supply any defects or omissions in the written evidence.[5] For the policy of the statute is to prevent fraud and perjury, by taking all the enumerated transactions out of the reach of any verbal testimony. Still, though parol evidence cannot be received to alter the terms of the written contract, or to supply any omissions in it, such evidence may be admitted to show the situation of the parties at the time the contract was made, or[6] to identify any plans or other documents or things referred to in the contract;[7] as also to explain the language employed,[8] or, it seems, even to fix the date at which it was committed to writing.[9]

[1] Allen *v.* Bennet, 3 Taunt. 169; Jackson *v.* Lowe, 1 Bing. 9; Phillimore *v.* Barry, 1 Camp. 513, per Lord Ellenborough; Warner *v.* Willington, 25 L. J., Ch., 662; 3 Drewry, 523, S. C.

[2] Dobell *v.* Hutchinson, 3 A. & E. 355, 371; 5 N. & M. 251, 260, S. C.; Macrory *v.* Scott, 5 Ex. R. 907; Ridgway *v.* Wharton, 3 De Gex, M. & Gord. 677; 6 H. of L. Cas. 238, S. C.; 1 St. Leon. V. & P. 171. See post, § 975.

[3] See per Parke, B., in Llewellyn *v.* E. of Jersey, 11 M. & W. 189.

[4] Archer *v.* Baynes, 5 Ex. R. 625; Richards *v.* Porter, 6 B. & C. 437; Cooper *v.* Smith, 15 East, 103. See Goodman *v.* Griffiths, 1 H. & N. 574.

[5] Boydell *v.* Drummond, 11 East, 142; 2 Camp. 163, S. C.; Cox *v.* Middleton, 2 Drew. 209; Ridgway *v.* Wharton, 3 De Gex, M. & Gord. 677; Caddick *v.* Skidmore, 3 Jur., N. S., 1185, per Ld. Cranworth, Ch.; Fitzmaurice *v.* Bayley, 30 Law Times, 230, in Ex. Ch.; 2 Kent, Comm. 511; Roberts on Frauds, 121; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R., 280—282; Abeel *v.* Radcliff, 13 Johns. 297.

[6] Sweet *v.* Lee, 3 M. & Gr. 466, per Tindal, C. J.

[7] Horsfall *v.* Hodges, 2 Coop. C. P. R. 115, per Sir John Leach.

[8] Sweet *v.* Lee, 3 M. & Gr. 452.

[9] Edmunds *v.* Downes, 2 Cr. & Mee. 459; Hartley *v.* Wharton, 11 A. & E. 934; 3 P. & D. 529, S. C.; Lobb *v.* Stanley, 5 Q. B. 574.

§ 938. Again, it does not signify to whom the memorandum which states the terms of the agreement is addressed, because the memorandum is not necessary to *constitute* the contract, but merely to furnish satisfactory *proof* of it. A letter, therefore, addressed to a third party,[1] or an answer to a bill in Chancery, or an affidavit in any legal proceeding,[2] will suffice, provided the document sufficiently refer to the terms of the original verbal promise; and even, where the party to be charged had attested a deed, which recited the oral agreement, this was held to be sufficient, as it appeared that in fact he knew of the recital.[3] But a written memorandum, made after the action is brought, will not satisfy the statute.[4]

§ 939. The *place of signature* is also immaterial, as the statute does not require that the writing should be *subscribed* by the party to be charged, but merely that it should be signed. If, therefore, a party inserts his name, either at the beginning, or in the body, of a document, for the purpose of authenticating it, this will be equally valid with a signature at the foot;[5] though in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.[6] Where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both parties in the body of the instrument, but concluded "As witness our hands," and no signatures were sub-

[1] Longfellow *v.* Williams, Pea. Add. Cas. 225, per Lawrence, J.; Rose *v.* Cunynghame, 11 Ves. 550; per Lord Hardwicke, 3 Atk. 503; 2 Ch. R. 147; 1 Vern. 110; 1 Smith Lead. Ca. 137.

[2] Barkworth *v.* Young, 26 L. J., Ch., 153, 158, per Kindersley, V. C.

[3] Welford *v.* Beezely, 1 Ves. Sen. 6; 1 Wils. 118, S. C.

[4] Bill *v.* Bament, 9 M. & W. 36.

[5] Lobb *v.* Stanley, 5 Q. B. 574, 583; Johnson *v.* Dodgson, 2 M. & W. 659, per Lord Abinger; Knight *v.* Crockford, 1 Esp. 190, 193, per Eyre, C. J.; Lemayne *v.* Stanley, 3 Lev. 1; Ogilvie *v.* Foljambe, 3 Mer. 53; Saunderson *v.* Jackson, 2 B. & P. 238, per Lord Eldon; Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 63, per Lord Cottenham; Bleakley *v.* Smith, 11 Sim. 150. See post, § 963.

[6] Johnson *v.* Dodgson, 2 M. & W. 659, per Lord Abinger.

scribed, the Court held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot.[1]

§ 940. With respect to the *mode of signature*, it matters not whether the Christian name be set out at length or denoted by the initial, or omitted altogether;[2] but it seems that the surname must be written at length, and that if the letter be signed by the mere initials of the party,[3] or if it be subscribed, without signature, "by your affectionate mother,"[4] or the like, it will not suffice. A *printed* signature has been held sufficient where the party to be charged had written other parts of the memorandum, or had done other acts amounting to a recognition of his printed name.[5] Again, it is unnecessary that the agreement or memorandum should be signed *by both parties;* for the Statute of Frauds only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded.[6] If it be said that, unless the plaintiff also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that if he has not done so, it is his own fault.[7]

[1] Hubert *v.* Treherne, 3 M. & Gr. 743; 4 Scott, N. R. 486, S. C.

[2] Lobb *v.* Stanley, 5 Q. B. 574, 581; Ogilvie *v.* Foljambe, 3 Mer. 53.

[3] Hubert *v.* Moreau, 2 C. & P. 528; 12 B. Moore, 216, S. C.; Sweet *v.* Lee, 3 M. & Gr. 452, 460.

[4] Selby *v.* Selby, 3 Mer. 2, per Sir Wm. Grant.

[5] Schneider *v.* Norris, 2 M. & Sel. 286; Saunderson *v.* Jackson, 2 B. & P. 238.

[6] Laythoarp *v.* Bryant, 2 Bing. N. C. 735; 8 Scott, 238, S. C.; Seton *v.* Slade, 7 Ves. 275, per Lord Eldon; Egerton *v.* Mathews, 6 East, 307; Allen *v.* Bennet, 3 Taunt. 169. The last two cases were decisions on § 17, which uses the word *parties.* These cases overrule the dicta of Lord Redesdale and Sir T. Plummer in Lawrence *v.* Butler, 1 Sch. & Lef. 13; and O'Rourke *v.* Perceval, 2 Ball & Beat. 58. See 3 M. & Gr. 462 n., and 2 Kent, Comm. 510. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, see Wetherell *v.* Langston, 1 Ex. R. 634; Pitman *v.* Woodbury, 3 Ex. R. 4; British Empire Assurance Co. *v.* Browne, 12 Com. B. 723; Morgan *v.* Pike, 14 Com. B. 473; Swatman *v.* Ambler, 8 Ex. R. 72.

[7] Laythoarp *v.* Bryant, 2 Bing. N. C. 743, per Tindal, C. J.

Even a written proposal accepted by parol has on several occasions been deemed sufficient.[1]

§ 941. Having made these general observations, which will be found to apply, not only to the Statute of Frauds, but to most, if not all, of the Acts that render documentary proof necessary, it will be convenient to notice briefly such of the transactions enumerated in §§ 4 and 17 of the Act of Charles the Second, as seem to require explanation. And first as to *guarantees*.[2] The law with respect to these instruments has been materially altered by the Mercantile Law Amendment Act of 1856.[3] Prior to the 29th of July in that year,[4] a guarantee, like other agreements, which the Statute of Frauds requires to be in writing,[5] was deemed invalid, unless the consideration for the promise was set forth in the document, or at least could be implied from the language used. But that rule, as was pointed out in the second edition of this work,[6] caused such gross injustice to be perpetrated, especially in the County Courts, that the attention of Parliament was at length directed to the matter. A clause was consequently inserted in the Act just cited,[7] which enacts that "no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party charged therewith or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." This provision is not very artistically drawn, for, in the first place, it does not extend, as it ought to do, to guarantees made before the 29th of July 1856, and next, it is silent as to the effect that will be produced by the

[1] Per Cresswell, J., in Ashcroft *v.* Morrin, 4 M. & Gr. 451; Smith *v.* Neale, 2 Com. B., N. S., 67, 88; Warner *v.* Willington, 3 Drewry, 532.

[2] Guarantees must now be in writing under the Scotch law. See 19 & 20 Vict., c. 60, § 6.

[3] 19 & 20 Vict., c. 97.

[4] When the Act passed.

[5] Ante, § 933.

[6] § 933.

[7] § 3 of the Act.

needless insertion in the memorandum of a *past* consideration, or of any other consideration which is insufficient in law. It remains, therefore, to be seen whether, in the last event, the Courts would admit parol evidence to vary the terms of the written document, and to show that the real consideration for the promise was other than that stated.

§ 941 A. In administering the law relating to guarantees, one of the main difficulties is to distinguish between *original* and *collateral* promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default.[1] As this is a question of fact for the jury, it is seldom possible to lay down any precise rule of construction, though the courts in this country, as well as those in America, have recently held that agreements by factors to sell upon del credere commission, do not fall within the fourth section of the Statute of Frauds, and consequently need not be in writing.[2] In general, however, cases of this kind must separately be determined on their own merits;[3] it being remembered that original promises will be valid, though verbally made,[4] while collateral promises must be in writing, in order to satisfy the statute.

§ 942. As the promise must, in the words of the Act, be one "to answer for the debt, default, or miscarriage of another,"[5] the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a

[1] Birkmyr *v.* Darnell, Salk. 27; 1 Smith Lead. Ca. 134; id. 4th ed. 224, S. C.; Forth *v.* Stanton, 1 Wms. Saund. 211 a—211 e; Barrett *v.* Hyndman, 3 Ir. Law R. 109. See Orrell *v.* Coppock, 26 L. J., Ch., 269.

[2] Couturier *v.* Hastie, 8 Ex. R. 40; Wickham *v.* Wickham, 2 Kay & J. 478, per Wood, V. C.; Wolff *v.* Koppell, 5 Hill, N. Y. Rep., 458.

[3] 1 Wms. Saund. 211 b; 1 Smith Lead. Ca. 134; id. 4th ed. 224.

[4] Unless for the sale of goods for the price of 10*l.* or upwards. See ante, § 932.

[5] As to the meaning of these words, see Macrory *v.* Scott, 5 Ex. R. 907.

written document.[1] For instance, if a defendant, in consideration that the plaintiff will discharge out of custody his debtor taken on a ca. sa., promises to pay the debt, this promise need not be in writing, it being regarded as an original one; because, the moment the debtor is discharged, *his* liability is at an end, and the promise of the defendant cannot take effect till after the discharge.[2] So, where a creditor had issued execution against a debtor, but subsequently it was arranged with the assent of all parties that the debtor should convey his property to a third party, who thereupon undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, it was held that this undertaking was not within the statute, as the effect of the arrangement was to discharge the original debtor.[3] So, where A. promised B. to pay him a certain sum in case he withdrew his record in an action against C. for assault and battery, this was held to be an original promise.[4]

§ 943. On the other hand, where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid, the Court held, that as the debtor's liability was kept alive by the warrant, the defendant's undertaking should be regarded in the light of a collateral guarantee, and as such, was a promise within the meaning of the statute.[5] So, where it was agreed between a plaintiff, his attorney, and the defendant, that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff, this was considered a promise to pay the debt of another, as, in the event of its breach, the attorney might still recover his costs from the plaintiff who

[1] See Gull *v.* Lindsay, 4 Ex. R. 45, 52.

[2] Goodman *v.* Chase, 1 B. & A. 297; Butcher *v.* Steuart, 11 M. & W. 857, 873; Lane *v.* Burghart, 1 Q. B. 933, 937, 938; 1 G. & D. 312, S. C.

[3] Bird *v.* Gammon, 3 Bing. N. C. 883; 5 Scott, 213, S. C.

[4] Read *v.* Nash, 1 Wils. 305; recognised in 3 Bing. N. C. 889; but questioned in 1 Wms. Saund. 211 c, 211 d.

[5] Lane *v.* Burghart, 3 M. & Gr. 597.

retained him.[1] Moreover, it makes no difference whether the goods were delivered to the third party,[2] or the debt incurred, or the default committed by him, *before* or *after* the promise by the defendant; for a promise to *indemnify*, if not within the words, is at least within the spirit of the statute; and, consequently, where the language was, in effect, this:—"If you will become bail for A., and he forfeits his bail-bond, I will save you harmless," it was held to be answering for the default of another.[3]

§ 944. Again, the statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach of *contract;* and, therefore, where A. had killed the plaintiff's horse by hard riding without his leave, a verbal promise by the defendant to pay the damage, in consideration of the plaintiff forbearing to sue A., was held to be void.[4] Where an entire promise is invalid as to a part for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void.[5] A promise to pay the promisee's own debt to a third person need not be in writing, for the Act merely applies to promises made to the person to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee.*[6]

§ 945. With respect to "*agreements made in consideration of marriage,*" the first observation which occurs is, that these words do not embrace mutual promises to marry; and therefore, not-

[1] Tomlinson *v.* Gell, 6 A. & E. 564; 1 N. & P. 588, S. C.

[2] Matson *v.* Wharam, 2 T. R. 80; Anderson *v.* Hayman, 1 H. Bl. 120.

[3] Green *v.* Cresswell, 10 A. & E. 453, 458; 2 P. & D. 430, S. C., overruling the dicta of Bayley and Parke, Js., in Thomas *v.* Cook, 8 B. & C. 728; 3 M. & Ry. 444, S. C.; and explaining Adams *v.* Dansey, 6 Bing. 506.

[4] Kirkham *v.* Marter, 2 B. & A. 613.

[5] Lexington *v.* Clark, 2 Vent. 223; Chater *v.* Beckett, 7 T. R. 201; Thomas *v.* Williams, 10 B. & C. 664, 671; Mechelen *v.* Wallace, 7 A. & E. 49.

[6] Eastwood *v.* Kenyon, 11 A. & E. 438, 446; 3 P. & D. 276, S. C.; Hargreaves *v.* Parsons, 13 M. & W. 561, 570, per Parke, B.; Thomas *v.* Cook, 8 B. & C. 728; 3 M. & Ry. 444, S. C.

withstanding the Act, such promises may be verbally made, as indeed is usually the case.[1] It may next be noticed, that although, as a general rule, equity will enforce a contract, even void by the statute, provided that it be a *complete* agreement,[2] and that there has been such a part performance on the side of the plaintiff, as that it would be a fraud on him, if the defendant could object that the agreement was not in writing,[3]—yet it has been repeatedly held, that the marriage *per se* is not a part performance within this rule;[4] and, therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady, relying on his honour, marries him, she cannot compel the performance of his agreement;[5] neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement made by her father with reference to settlements.[6] Perhaps, however, in the event of a clear case of fraud being established, the Court, notwithstanding the Act, would compel the father to realise the expectations, on the faith of which the marriage was contracted;[7] and little doubt can be entertained that, if the father were to say to the suitor, "Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion," this proposal, though not reduced to writing, would amount to a valid contract in equity, if the marriage were actually to take place, and the jointure were settled.[8] It is also now established law, that a verbal agreement

[1] B. N. P. 280, c.

[2] Lady E. Thynne *v.* E. of Glengall, 2 H. of L. Cas. 131.

[3] Clinan *v.* Cooke, 1 Sch. & Lef. 41; Kine *v.* Balfe, 2 Ball & Beat. 347, 348; Surcome *v.* Pinniger, 3 De Gex, M. & Gord. 571; Taylor *v.* Beech, 1 Ves. Sen. 297.

[4] Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 64, per Lord Cottenham; Redding *v.* Wilks, 3 Bro. C. C. 401; Lassence *v.* Tierney, 1 M. & Gord. 571, 572, per Lord Cottenham; 2 Hall & T. 115, 134, 135, S. C.; Warden *v.* Jones, 23 Beav. 487.

[5] Montacute *v.* Maxwell, 1 P. Wms. 619.

[6] Dundas *v.* Dutens, 1 Ves. 199.

[7] Baron de Biel *v.* Hammersley, 3 Bea. 469, 475, 476, per Lord Langdale; 12 Cl. & Fin. 86, per Lord Brougham, S. C.

[8] Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 45, 64, per Lord Cottenham; 65 & 66, per Lord Campbell and Lord Lyndhurst. See also Maunsell *v.* White, 4 H. of L. Cas. 1039; Bold *v.* Hutchinson, 20 Beav. 250; 5 De Gex, M. & Gord. 558, S. C.; Jameson *v.* Stein, 21 Beav. 5.

made before marriage will be enforced in equity, if subsequently to the marriage it has been recognised and adopted in writing.[1] But the Court of Chancery will not interfere, even though there be a written memorandum, unless it appears that the marriage was contracted on the faith of the agreement; and, therefore, where a father wrote to his daughter, saying that he had agreed to give her intended husband 3000*l.* as her portion, and this letter was never shown to her husband, it was held not to be such an agreement in writing as satisfied the statute, since the husband could not have married on the faith of the letter.[2]

§ 946. In interpreting what is meant by an *agreement that is not to be performed within a year* from the making thereof, the Courts have held that the statute does not apply, where the contract is capable of being performed on the one side or on the other within a year.[3] Neither does it extend to an agreement made by a contractor to allow a stranger to share in the profits of a contract, that is incapable of being completed within a year, because such an agreement amounts to nothing more than the vendition of a right which is performed instanter on the bargain being struck.[4] It would seem also that the statute is inapplicable in any case where the action is brought upon an *executed* consideration;[5] for as the object of the Legislature clearly was, to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives,—it does not appear unreasonable to limit the statute to such actions only as are

[1] Barkworth *v.* Young, 26 L. J., Ch., 153, 157, per Kindersley, V. C.; Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 64, per Lord Cottenham, citing Hodgson *v.* Hutchenson, 5 Vin. Abr. 522; Taylor *v.* Beech, 1 Ves. Sen. 297; and Montacue *v.* Maxwell, 1 Str. 236; and questioning Randall *v.* Morgan, 12 Ves. 73, where Sir William Grant expressed serious doubt upon the subject. See also 12 Cl. & Fin. 86, per Lord Brougham; and 3 Bea. 475, 476, per Lord Langdale.

[2] Ayliffe *v.* Tracy, 2 P. Wms. 65.

[3] Cherry *v.* Heming, 4 Ex. R. 631; and Smith *v.* Neale, 2 Com. B., N. S., 67; both recognising Donellan *v.* Read, 3 B. & Ad. 899.

[4] M'Kay *v.* Rutherford, 6 Moo. P. C. R. 413, 429.

[5] See ante, §§ 893, 900—902; post, §§ 953, 954.

brought to recover damages for the *non-performance* of contracts, which are not to be performed on either side within a year from the time of their being made.[1] Subject, however, to the limitation just stated, a *part performance* is not sufficient to take the case out of the statute; but whenever it appears, either by express stipulation, or by inference from the circumstances, that the contract is not to be *completed* on either side within the year, documentary proof of the agreement must be given.[2] If, therefore, a farm-servant be verbally hired for a year's service, which is to commence at a future day, he cannot maintain an action against his master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge.[3] But though no action can be brought on the parol agreement, it will not be void for all purposes; for in the event of a sufficient service under it, the servant may acquire a settlement.[4]

§ 947. Again, the mere fact that the contract may be determined by the parties within the year, will not take the case out of the statute, if by its terms it purports to be an agreement, which is not to be completely performed till after the expiration of that period.[5] For the rule of law here is the same as in the case of a defeasible estate, where if a party enters, he is *in* of the whole estate, though an event may afterwards occur, which would prevent the estate from continuing during the entire term contemplated in the original grant.[6] Still, if the agreement is silent as to the time within which it is to be performed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the

[1] Souch *v.* Strawbridge, 2 Com. B. 814, per Tindal, C. J.

[2] Boydell *v.* Drummond, 11 East, 142, 156, 159.

[3] Bracegirdle *v.* Heald, 1 B. & A. 722; Snelling *v.* Huntingfield, 1 C. M. & R. 20; 4 Tyr. 606, S. C.; Giraud *v.* Richmond, 2 Com. B. 835.

[4] 1 B. & A. 727, per Bayley, J.

[5] Birch *v.* Earl of Liverpool, 9 B. & C. 392, 395; 4 M. & Ry. 380, S. C.; Roberts *v.* Tucker, 3 Ex. R. 632; Dobson *v.* Collis, 1 H. & N. 81.

[6] R. *v.* Herstmonceaux, 7 B. & C. 555, per Bayley, J. See ante, §§ 920—922.

giving of a notice, or the like, the case is not within the statute, though the event, which is to terminate the agreement, does not in fact occur within the year.[1] When the contract is clearly one which is not to be performed within a year, it matters not whether it were made in this or in any other country; for as the Act does not bar the right as well as the remedy, or in other words, does not render the agreement void, but only prevents its being enforced by action here, it applies to all foreign contracts equally with those entered into in England.[2]

§ 948. The term, *interest in lands*, used in § 4, is one that has given rise to much litigation, and its meaning is not yet satisfactorily defined. Little doubt, however, can be entertained, that it extends to a contract to abate a tenant's rent;[3] or to submit to arbitration the question whether a lease shall be granted;[4] or to relinquish a tenancy, and let another party into possession for the residue of term;[5] or to permit the profits of a clergyman's living to be received by a trustee;[6] or to become a partner in a colliery, which was to be demised by the partnership upon royalties;[7] or to take furnished lodgings;[8] or to convey an equity of redemption.[9] On the other hand, it appears that an equitable mortgage by the deposit of title-deeds;[10] a collateral agreement by a lessee to pay a per-centage on money laid

[1] Souch v. Strawbridge, 2 Com. B. 808; Wells v. Horton, 4 Bing. 40; 12 B. Moore, 177, S. C.; Gilbert v. Sykes, 16 East, 154; Peter v. Compton, Skin. 353; 1 Smith, L. C. 142; id. 241, 4th ed., S. C.; Fenton v. Emblers, 3 Burr. 1278; 1 W. Bl. 353, S. C. See Mavor v. Payne, 3 Bing. 285; 11 B. Moore, 2, S. C.

[2] Leroux v. Brown, 12 Com. B. 801.

[3] O'Connor v. Spaight, 1 Sch. & Lef. 306.

[4] Walters v. Morgan, 2 Cox, Ch. C., 369.

[5] Buttemere v. Hayes, 5 M. & W. 456; 7 Dowl. 489, S. C.; Smith v. Tombs, 3 Jur. 72, Q. B.; Cocking v. Ward, 1 Com. B. 858; Kelly v. Webster, 12 Com. B. 283; Smart v. Harding, 15 Com. B. 652.

[6] Alchin v. Hopkins, 1 Bing. N. C. 102; 4 M. & Sc. 615, S. C.

[7] Caddick v. Skidmore, 3 Jur., N. S., 1185, per Ld. Cranworth, Ch.

[8] Edge v. Strafford, 1 C. & J. 391; 1 Tyr. 293, S. C.; Inman v. Stamp, 1 Stark. R. 12, per Lord Ellenborough; Mechelen v. Wallace, 7 A. & E. 49; 2 N. & P. 224, S. C.; Vaughan v. Hancock, 3 Com. B. 766.

[9] Massey v. Johnson, 1 Ex. R. 255, per Rolfe, B. See Toppin v. Lomas, 16 Com. B. 145.

[10] Russel v. Russel, 1 Bro. Ch. C. 269; 12 Ves. 197.

out by the landlord on the premises;[1] a contract relating to the investigation of a title to land;[2] an agreement between a landlord and tenant, that the former shall take at a valuation, certain fixtures left by the latter in the house;[3] or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his lands;[4] are not within the statute. How far the Act applies to profits à prendre, easements, and other incorporeal rights relating to lands, is a question by no means clear; though, on principle, it ought to extend to all agreements respecting rights of common, rights of way, grants of rent-charge, tolls, or licenses coupled with an interest, however trifling, in lands.[5]

§ 949. The question, whether *shares* in a joint-stock company, possessed of *real estate*, could be regarded as an interest in lands, was one which, until recently, was much discussed in Westminster Hall. The Legislature has, however, to a great extent set the matter at rest, by enacting that all shares issued under the Joint-Stock Companies Act, 1856, "shall be personal estate, and shall not be of the nature of real estate."[6] In many cases, too, where the company has been incorporated by statute, parliament has expressly declared, that the shares shall be deemed personal estate.[7] So, even in the absence of such a declaration, if the company be *incorporated* by statute or by charter from the Crown, and the real property be vested in the corporation, who are to have the sole management of it, the shares of the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of

[1] Hoby *v.* Roebuck, 7 Taunt. 157.
[2] Jeakes *v.* White, 6 Ex. R. 873.
[3] Hallen *v.* Runder, 1 C. M. & R. 266; 3 Tyr. 959, S. C.
[4] Gillanders *v.* Lord Rossmore, Jones Ex. R. 504.
[5] Cook *v.* Stearns, 11 Mass. 533; R. *v.* Salisbury, 8 A. & E. 716.
[6] 19 & 20 Vict., c. 47, § 15.
[7] This is so in the case of all companies subject to the provisions of "The Companies' Clauses Consolidation Act, 1845," 8 & 9 Vict., c. 16, § 7. So also in the case of the Vauxhall Bridge Co., 1 Gl. & Jam. 101; of the Lancaster Canal Co., Mont. & Bl. 112; of the London and Birmingham Rail. Co. (see Bradley *v.* Holdsworth, 3 M. & W. 422), and of many others.

the company.[1] The same doctrine will, it seems, apply though the company be *unincorporated*—as, for instance, if it be a mining co-partnership conducted on the cost-book principle—provided that trustees be seized of the real estate in trust to use it for the benefit of the shareholders, and to make profits out of it, as part of the stock in trade; and provided that the interest of the shareholders be confined to those profits.[2] If however, the trustees hold the real estate in trust for themselves and the co-adventurers, present and future, in proportion to their number of shares, then there will be a direct trust in the realty; and, consequently, neither a bargain for, nor a transfer of, a share in such trust can be made without a note in writing.[3] The question—under which of these two species of trusts the lands of any particular company may be held—is one of fact, to be determined in each case by the jury.[4] If the freehold, which forms the basis and subject-matter of the trade of an unincorporated company, be vested in the collective body, the shares of the individual copartners seem clearly to fall within the meaning of the 4th section.[5]

§ 950. It is now distinctly determined, that *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, *are not* "*goods, wares and merchandises,*" within the 17th section of the Act.[6] As this point was ruled on the ground that such

[1] Bligh *v.* Brent, 2 You. & Col., Ex. R., 268; Bradley *v.* Holdsworth, 3 M. & W. 422; Hibblewhite *v.* M'Morine, 6 M. & W. 214, per Parke, B.; 2 Rail. Ca. 67, S. C.; Humble *v.* Mitchell, 11 A. & E. 205; 2 Rail. Ca. 70, S. C.; Baxter *v.* Brown, 7 M. & Gr. 216, per Tindal, C. J.; Hilton *v.* Geraud, 1 De Gex & Sm. 187; Watson *v.* Spratley, 10 Ex. R. 237, per Martin, B., 244, per Parke, B. See Edwards *v.* Hall, 25 L. J., Ch., 82; 6 De Gex, M. & Gord. 74, S. C.; overruling Ware *v.* Cumberledge, 20 Beav. 503; and see also Powell *v.* Jessopp, 18 Com. B. 336.

[2] Watson *v.* Spratley, 10 Ex. R. 222. See Myers *v.* Perigal, 2 De Gex, M. & Gord. 599; Walker *v.* Bartlett, 18 Com. B. 845.

[3] Id.; Baxter *v.* Brown, 7 M. & Gr. 198; Boyce *v.* Green, Batty's R. 608.

[4] Watson *v.* Spratley, 10 Ex. R. 222, per Parke and Alderson, Bs.

[5] See further as to the transfer of shares in joint-stock companies, ante, § 908.

[6] Humble *v.* Mitchell, 11 A. & E. 205; 2 Rail. Ca. 70, S. C.; Hibblewhite *v.* M'Morine, 6 M. & W. 214, per Parke, B.; Knight *v.* Barber, 16 M. & W. 66; Tempest *v.* Kilner, 3 Com. B. 249; Bowlby *v.* Ball, id. 284; Duncuft *v.* Albrecht, 12 Sim. 189; Watson *v.* Spratley, 10 Ex. R. 222.

shares are mere choses in action, the judgment in which it was determined has since been held[1] to have decided in the negative another question, respecting which all the judges were once equally divided in opinion; namely, whether contracts for the sale of stock or exchequer bills were within the Act.[2]

§ 951.[3] The principal difficulties in interpreting what is meant by an "interest in lands," have arisen in applying that term to cases, where trees, *growing crops*, or other things annexed to the freehold, have formed the subject of the contract; and here, the decisions of the Courts, so far from furnishing a safe guide, only assist in confusing the student, since, to use the words of Lord Abinger, "no general rule is laid down in any of them, that is not contradicted by some other."[4] Indeed, the judges themselves have not yet agreed upon any uniform test, by which to try the merits of this question.[5] In some cases they have endeavoured to solve it by reference to the law of emblements; and have held that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.[6] In other cases the test has been, whether the property in dispute could have been seized in execution at common law;[7] in others, again, a distinction has been drawn between fructus industriales, and the natural products of the soil;[8] while, in not a few, the decisions have rested, partly on the legal character of the principal subject-matter of the contract, but principally on the consideration, whether, in order to effectuate *the intention* of the parties, it were necessary to give the vendee an interest in the land.[9]

[1] Heseltine v. Siggers, 1 Ex. R. 856.

[2] Pickering v. Appleby, Comyn's Rep. 354, cited in Colt v. Netterville, 2 P. Wms. 308, per Lord Ch. King.

[3] Gr. Ev., § 271, in part as to first four lines.

[4] Rodwell v. Phillips, 9 M. & W. 505.

[5] See 1 Sugden, V. & P. 141—158.

[6] Rodwell v. Phillips, 9 M. & W. 505; Jones v. Flint, 10 A. & E. 758.

[7] Dunne v. Ferguson, Hayes, Ex. R., 543; Rodwell v. Phillips, 9 M. & W. 505; Jones v. Flint, 10 A. & E. 758.

[8] Jones v. Flint, 10 A. & E. 758, 759, 760; Evans v. Roberts, 5 B. & C. 832; Rodwell v. Phillips, 9 M. & W. 503, per Lord Abinger.

[9] Jones v. Flint, 10 A. & E. 759.

§ 952. Such being the uncertain state of the law, the following propositions are submitted with much diffidence. First, a contract for the purchase of *fruits of the earth, ripe,* though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them.[1] Secondly, a sale of any *growing* produce of the earth, *reared annually by labour and expense,* and in actual existence at the time of the contract,—as, for instance, a growing crop of corn,[2] or hops,[3] or potatoes,[4] or turnips,[5]—is not within the 4th section of the statute, though the purchaser is to harvest or dig them. Whether the same rule would apply to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced *within the year* in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements,[6] is a question which still remains to be decided. Thirdly, an agreement respecting the sale of a crop of growing fruit,[7] or grass,[8] or of standing underwood,[9] growing poles,[10] or timber, is within the fourth section, and a written contract of sale cannot be dispensed with.[*] In one case an agreement to sell growing timber was held not to convey any interest in the land, but there the vendor had contracted to sell the timber at so much per foot, and that contract the Court regarded in the same light as if it had related

[1] Parker *v.* Staniland, 11 East, 362 ; Cutler *v.* Pope, 1 Shepl. 337.

[2] Jones *v.* Flint, 10 A. & E. 753 ; 2 P. & D. 594, S. C.

[3] Per Parke, B., in Rodwell *v.* Phillips, 9 M. & W. 503, questioning Waddington *v.* Bristow, 2 B. & P. 452. See also Graves *v.* Weld, 5 B. & Ad. 119, 120.

[4] Sainsbury *v.* Matthews, 4 M. & W. 343 ; 7 Dowl. 23, S. C. ; Evans *v.* Roberts, 5 B. & C. 829 ; 8 D. & R. 611, S. C. ; Warwick *v.* Bruce, 2 M. & Sel. 205.

[5] Dunne *v.* Ferguson, Hayes, Ex. R., 540 ; Emmerson *v.* Heelis, 2 Taunt. 38, contrà, must be considered as overruled by Evans *v.* Roberts, 5 B. & C. 833, 834, and by Jones *v.* Flint, 10 A. & E. 759.

[6] Graves *v.* Weld, 5 B. & Ad. 105, 118—120 ; 1 Sugden, V. & P. 156.

[7] Rodwell *v.* Phillips, 9 M. & W. 501 ; resolving a doubt suggested by Littledale, J., in Graves *v.* Weld, 5 B. & Ad. 116.

[8] Crosby *v.* Wadsworth, 6 East, 602 ; Carrington *v.* Roots, 2 M. & W. 248.

[9] Scorell *v.* Boxall, 1 Y. & Jer. 396.

[10] Teal *v.* Auty, 2 B. & B. 99 ; 4 Moore, 542, S. C.

to the sale of timber already felled.[1] Fourthly, if the land itself is agreed to be sold or let, and the vendee or tenant contracts to purchase the growing crops, this last contract, though the crops taken under it may form the subject of a distinct valuation, will be so incorporated with the agreement relating to the land as to be inseparable from it, and will consequently fall within the 4th section of the Act.[2]

§ 953. Where growing crops do not amount to an interest in lands, it is clear that an agreement respecting them will fall within the 17th section; and, therefore, at first sight, it may seem unimportant to raise any dispute upon the subject. But, in truth, two material distinctions exist between the 4th and the 17th sections; for, first, contracts under the former must be stamped, while those under the latter are exempt;[3] and next, no writing is required by the 17th section, if the subject-matter of the contract is under the value of 10*l.*, or if there has been a part payment, or a part acceptance, by the purchaser.[4] It is true, that parol agreements touching lands will be enforced in courts of equity, if they have been performed in some material part; as for instance, if possession has been distinctly taken under them and rent paid, or the like;[5] but even in those courts, such agreements will not be excluded from the operation of the statute by any part performance, which does not place the acting party in such a position, that it would be a fraud upon him if the contract were not completed.[6]

§ 954. It was at one time attempted to import this rule into courts of law;[7] but the attempt failed;[8] and the only relaxations

[1] Smith *v.* Surman, 9 B. & C. 561 ; 4 M. & Ry. 455, S. C. ; explained by Lord Abinger in Rodwell *v.* Phillips, 9 M. & W. 505.

[2] Earl of Falmouth *v.* Thomas, 1 C. M. & R. 89 ; Mayfield *v.* Wadsley, 3 B. & C. 366, per Littledale, J.

[3] 55 Geo. 3, c. 184, Sch. part 1, tit. Agreement.

[4] Ante, § 932.

[5] Kine *v.* Balfe, 2 Ball & Beat. 347, 348. See Dale *v.* Hamilton, 11 Jur. 574.

[6] Clinan *v.* Cooke, 1 Sch. & Lef. 41, per Lord Rederdale.

[7] Brodie *v.* St. Paul, 1 Ves. 333, per Buller, J.

[8] Cooth *v.* Jackson, 6 Ves. 39, per Lord Eldon.

of the statute which the judges at common law will allow, amount to these;—first, if a parol agreement respecting lands has been *entirely executed by both parties*, the contract cannot afterwards be called in question should it be necessary to refer to it for any collateral purpose;[1] and next, if it has been *executed by one party*, and the transaction be of such a nature as to admit of an action for use and occupation or in indebitatus assumpsit, the other party, perhaps, will not be permitted to defeat this action by setting up the statute.[2] For instance, though the performance of a verbal contract to take furnished lodgings, so long as it remains executory, cannot be enforced, yet, if possession under it is taken by the tenant, it may then be supported by the landlord, either as a valid lease for less than three years under the second section of the Act, or, at least, as affording evidence of the terms of such lease.[3] But courts of common law will not go further;[4] and therefore if an action be brought *upon the contract itself*, the mere fact that the plaintiff has performed his part of the agreement will not entitle him to recover against the defendant who has omitted to perform his part.

§ 955. This point has been determined in the cases of Cocking *v.* Ward,[5] and Kelly *v.* Webster.[6] In the former of these two cases, the plaintiff sought to recover from the defendant 100*l.* upon a parol contract, under which the plaintiff, in consideration of that sum, had given up her tenancy in a farm, and had procured the defendant to be put into her place. At the trial the defendant's counsel objected, that the agreement, being for the sale of an interest in land, could not be proved by parol testimony; but, for the plaintiff, it was insisted, that as the agreement had been executed, it might be so proved. The question was reserved

[1] Griffith *v.* Young, 12 East, 513; Seaman *v.* Price, 2 Bing. 437; 10 Moore, 38, S. C.; Green *v.* Saddington, 7 E. & B. 503.

[2] See ante, §§ 893, 900—902, 946.

[3] See Lord Bolton *v.* Tomlin, 5 A. & E. 856; 1 N. & P. 247, S. C.

[4] Quære, as to effect of §§ 83—86 of 17 & 18 Vict., c. 125; and §§ 85—88 of 19 & 20 Vict., c. 102, Ir., which enable parties to plead equitable defences and replications, in actions at law?

[5] 1 Com. B. 858. This case appears to overrule Price *v.* Leyburn, Gow's N. P. R. 109, per Dallas, C. J.

[6] 12 Com. B. 283.

for the opinion of the Court, who on argument held, that as the special count was framed upon the contract itself, to enforce payment of the stipulated price of the interest in the land which the plaintiff gave up and to which the defendant succeeded, this contract could not be considered as altogether executed, so long as the defendant's part still remained to be performed; and consequently, that it must be regarded as a contract within the Statute of Frauds. Feeling, however, that in a moral point of view this decision was most unjust, the Court further held, on the authority of many cases,[1] and on principle, that, as the defendant had admitted to the plaintiff that he owed her the stipulated price, the amount might be recovered on a count upon an account stated.

§ 956. As the 17th section is confined to contracts for the *sale* of goods, it does not apply to a contract, which is substantially one for work and labour,[2] or to an agreement to procure goods for another and to convey them to a certain place.[3] Neither does this section, any more than the 4th,[4] extend to fixtures, which, though chattels, are not goods, wares, or merchandise.[5] But where the principal subject-matter of a contract is the sale of goods of the price or value of 10*l.* or upwards, the contract falls within the section, though it includes other matters, as for instance, the agistment of cattle, to which the statute does not apply.[6] With respect to the price, which must be 10*l.* or upwards in order to render a writing necessary, it may be observed, that if a person purchases several articles at one time, though at distinct prices, the transaction will be regarded as one entire contract; and consequently, if the whole purchase-money amounts

[1] Knowles *v.* Michel, 13 East, 249; Highmore *v.* Primrose, 5 M. & Sel. 65; Pinchon *v.* Chilcott, 3 C. & P. 236; Seago *v.* Deane, 4 Bing. 459; 1 M. & P. 227, S. C.; Peacock *v.* Harris, 10 East, 104; Teal *v.* Auty, 2 B. & B. 99; 4 Moore, 542, S. C.; Dynes *v.* O'Neill, Cr. & Dix, Abr. Cas. 329.

[2] Clay *v.* Yates, 25 L. J., Ex., 237; 1 H. & N. 73, S. C.

[3] Cobbold *v.* Caston, 1 Bing. 399.

[4] Ante, § 948.

[5] Horsfall *v.* Hey, 2 Ex. R. 778.

[6] Harman *v.* Reeve, 25 L. J., C. P., 257.

to 10*l*., the case will be within the statute, though none of the articles taken separately may be of that value.[1]

§ 957. The *part acceptance* and *actual receipt* mentioned by the statute have given rise to much litigation; but without entering into any lengthened discussion of the numerous decisions which bear on this point, it may suffice to observe, that the statute means such an acceptance and receipt as will preclude the vendor, on the one hand, from retaining any lien on the goods,[2] and the purchaser, on the other, from objecting to their quantity or quality.[3] Indeed the question,—which must be submitted as one of fact to the jury[4],—is whether the circumstances prove a delivery by the vendor, and an actual acceptance and receipt by the vendee, intended by *both parties* to have the effect of transferring the right of possession from the one to the other.[5] The mere marking of goods, therefore, by the vendee in the vendor's shop, where they are to be paid for by ready money, will not suffice, as such an act, even when assented to by the vendor, will not deprive him of the right of lien.[6] But where a party, having agreed to purchase some

[1] Baldey *v.* Parker, 2 B. & C. 37; 3 D. & R. 220, S. C. See also Elliott *v.* Thomas, 3 M. & W. 170; Bigg *v.* Whisking, 14 Com. B. 195.

[2] Baldey *v.* Parker, 2 B. & C. 37, 44; 3 D. & R. 220, S. C.; Maberley *v.* Sheppard, 10 Bing. 101, 102, per Tindal, C. J.; Smith *v.* Surman, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, S. C.; Tempest *v.* Fitzgerald, 3 B. & A. 680, 684, per Holroyd, J; Carter *v.* Toussaint, 5 B. & A. 859, per Bayley, J.; Holmes *v.* Hoskins, 9 Ex. R. 753.

[3] Norman *v.* Phillips, 14 M. & W. 283, per Alderson, B.; Smith *v.* Surman, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, S. C.; Howe *v.* Palmer, 3 B. & A. 321, 325, per Holroyd, J.; Hansom *v.* Armitage, 5 B. & A. 559, per Abbott, C. J.; Acebal *v.* Levy, 10 Bing. 384, per Tindal, C. J. In Morton *v.* Tibbett, 15 Q. B. 428, the Court of Queen's Bench denied that the proposition stated in the text was law; but the judgment, though very elaborate, is by no means satisfactory on this point. See also Parker *v.* Wallis, 5 E. & B. 21.

[4] Morton *v.* Tibbett, 15 Q. B. 441; Bushel *v.* Wheeler, id. 442, n.

[5] Phillips *v.* Bistolli, 2 B. & C. 514; recognised in Maberley *v.* Sheppard, 10 Bing. 102. See Curtis *v.* Pugh, 10 Q. B. 111; Saunders *v.* Topp, 4 Ex. R. 390; and Tomkinson *v.* Staight, 25 L. J., C. P., 85; 17 Com. B. 697, S. C.

[6] Baldey *v.* Parker, 2 B. & C. 37; 3 D. & R. 220, S. C.; Bill *v.* Bament, 9 M. & W. 36; Proctor *v.* Jones, 2 C. & P. 532. These cases seem virtually to overrule Hodgson *v.* Le Bret, 1 Camp. 233; and Anderson *v.*

wool, had it sent to another warehouse for deposit, and then weighed it and packed it in his own sheeting, this was held to be a sufficient acceptance, though, by the course of dealing, he was not to remove it to its ultimate place of destination before payment, and no payment had been made. The Court considered that, under these circumstances, the vendor had not what could properly be called a lien on the wool, but merely a special interest in it, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser.[1] So, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable; it was held that this direction was equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession.[2] So, where a stack of hay had been purchased by parol, and afterwards the vendee sold part to a third person, who removed it, the jury were held to be justified in finding an actual acceptance.[3]

§ 958. A person, intrusted with another's goods to sell, may himself become the purchaser by parol, and may do subsequent acts which will amount to an acceptance on his part; as, for instance, if he sells them to a stranger on his own account.[4] The evidence, however, to sustain such a case must be extremely clear.[5]

Scot, id. 235, n. See Saunders *v.* Topp, 4 Ex. R. 390; and Acraman *v.* Morrice, 8 Com. B. 449.

[1] Dodsley *v.* Varley, 12 A. & E. 632; 2 P. & D. 448, S. C. As to the effect of handing over a sample of the goods, see Gardner *v.* Grout, 2 Com. B., N. S., 340.

[2] Elmore *v.* Stone, 1 Taunt. 458; explained and recognised by Bayley, J., in Smith *v.* Surman, 9 B. & C. 570. See Carter *v.* Toussaint, 5 B. & A. 855; 1 D. & R. 515, S. C.; Beaumont *v.* Brengeri, 5 Com. B. 301; Holmes *v.* Hoskins, 9 Ex. R. 753; Marvin *v.* Wallace, 25 L. J., Q. B., 369; 6 E. & B. 726, S. C. See Taylor *v.* Wakefield, 6 E. & B. 765.

[3] Chaplin *v.* Rogers, 1 East, 192; recognised by Bayley, J., in 9 B. & C. 570. See Stoveld *v.* Hughes, 14 East, 308; and Searle *v.* Keeves, 2 Esp. 598.

[4] Edan *v.* Dudfield, 1 Q. B. 302; 4 P. & D. 656, S. C.; Lillywhite *v.* Devereux, 15 M. & W. 289, 291.

[5] Id.

§ 959. Where the goods are ponderous and incapable of being handed over from one to another, a constructive delivery, such, for example, as the giving up the key of the warehouse where they are deposited, or the delivery of other indicia of property, will be sufficient.[1] But in all these cases, the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal;[2] and, therefore, where goods are lodged with a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order, will not amount to an actual receipt of the goods, so as to bind the bargain:[3] but to have this effect, the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or, in other words, agree to hold the property henceforth as his agent.[4]

§ 960. One of the chief difficulties in construing this branch of the statute, is where goods, verbally purchased, are delivered to a carrier or wharfinger named by the vendee; and here it seems to have been once considered, that such delivery was sufficient to satisfy the statute.[5] However, it has since been held, that though the delivery to the carrier may be a delivery to the purchaser, the acceptance of the carrier is not an acceptance by him;[6] and therefore, where timber, verbally ordered, was forwarded in this manner to the purchaser, but he refused to take it in, the Court of Exchequer held that the jury were not warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to take the goods till after the expiration of

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[1] Chaplin v. Rogers, 1 East, 195, per Lord Kenyon.

[2] Nicholle v. Plume, 1 C. & P. 272, per Best, C. J.; Edan v. Dudfield, 1 Q. B. 307.

[3] M'Ewan v. Smith, 2 H. of L. Cas. 309.

[4] Farina v. Home, 16 M. & W. 119, 123, per Parke, B.; Bentall v. Burn, 3 B. & C. 423; 5 D. & R. 284, S. C.

[5] Hart v. Sattley, 3 Camp. 528, per Chambre, J. See Dawes v. Peck, 8 T. R. 330; and Dutton v. Solomonson, 3 B. & P. 582.

[6] Johnson v. Dodgson, 2 M. & W. 656, per Parke, B. See Acebal v. Levy, 10 Bing. 376; 4 M. & Sc. 217, S. C.; and Coats v. Chaplin, 3 Q. B. 483.

more than a month.[1] It is true that, under somewhat similar circumstances, the Court of Queen's Bench have pronounced an opposite decision; but in that case the vendee did not reject the goods for seven months; and Mr. Justice Coleridge rested his judgment on the ground, that the inspection of the goods was to be made within a reasonable time.[2] Whether this distinction can be supported is another question; but thus much is at least clear—that if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to object to them, and his conduct will amount to an acceptance;[3] and further, the same rule will hold, if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality.[4] It is also clear, that if the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property continuing in the vendor,—as, for instance, if he changes their original destination, and resells them to a third party at a profit,—the jury will be justified in finding that he has accepted the goods and actually received them, though they have merely been delivered to his carriers, and he himself has never seen them.[5]

§ 961.[6] The Statute of Frauds also requires, that *devises of lands or tenements*, if *executed before the 1st of January*, 1838,[7] shall be in writing, and signed by the testator, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the testator's presence, by three or more credible, that is, competent witnesses.[8] One main object of

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[1] Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; Hunt *v.* Hecht, 8 Ex. R. 814.

[2] Bushel *v.* Wheeler, 8 Jurist, 532; 15 Q. B. 442, n., S. C.; explained by Alderson, B., in 14 M. & W. 282.

[3] Coleman *v.* Gibson, 1 M. & Rob. 168, per Lord Tenterden; Norman *v.* Phillips, 14 M. & W. 279, per Alderson, B.

[4] Norman *v.* Phillips, 14 M. & W. 283, per Alderson, B.

[5] Morton *v.* Tibbett, 15 Q. B. 428; explained by Martin, B., in Hunt *v.* Hecht, 8 Ex. R. 818.

[6] Gr. Ev., § 272, slightly.

[7] When 7 Will. 4 & 1 Vict., c. 26, came into operation. See post, § 964.

[8] 29 Car. 2, c. 3, § 5; 7 Will. 3, c. 12, § 3, Ir.

these provisions, which haye been substantially adopted in most of the United States,[1] was to prevent the possibility of the witnesses substituting any other instrument for that which the testator gave them to attest;[2] and, consequently, it has been held, that to be present, within the meaning of the statute, the testator must be near enough to see and identify the instrument, though, in truth, he may not attempt to do so, and may even not be in the same room.[3]

§ 962. In favour of attestations the presumption of law is, that if the testator *might* have seen, he *did* see, the witnesses subscribe their names;[4] and the fact of his having been in the same room is primâ facie evidence of an attestation in his presence, as an attestation not made in the same room, is primâ facie not made in his presence.[5] It[6] must further appear that the testator, at the time of attestation, was in a state of consciousness; for if he were then insensible, the will is void.[7] It is not, however, necessary, either that the witnesses should have attested in the presence of each other, or all at the same time, or[8] that they should actually

[1] In Vermont alone the will is required to be sealed. Three witnesses are necessary to a valid will, in Vermont, New Hampshire, Maine, Massachusetts, Rhode-Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise is good, if properly signed, though it be not subscribed by any attesting witness, provided it can be proved by two or more competent witnesses; and if it be attested by witnesses, it may still be proved by others. 4 Kent, Comm. 514; 6 Cruise's Dig. 44, 46, 47, notes, (3rd Am. edit.)

[2] Per Tindal, C. J., in White v. Trustees of British Museum, 6 Bing. 319.

[3] Shires v. Glascock, 2 Salk. 688; Carth. 81, S. C.; 4 Kent, Comm. 515, 516; Casson v. Dade, 1 Bro. Ch. C. 99. In the goods of Colman, 3 Curt. Ecc. R. 118.

[4] Todd v. Earl of Winchelsea, 2 C. & P. 488; M. & M. 12, S. C., per Abbott, C. J.; Doe v. Manifold, 1 M. & Sel. 294. For other presumptions respecting the *execution and alteration of wills*, see ante, §§ 130—136.

[5] Neil v. Neil, 1 Leigh, R. 6, 10—21, where the cases on this subject are ably reviewed by Carr, J.

[6] Gr. Ev., § 272, slightly.

[7] Right v. Price, 1 Doug. 241.

[8] Cook v. Parsons, Prec. in Ch. 184; Jones v. Lake, 2 Atk. 177, n.;

have seen the testator sign, or have heard him acknowledge that the paper was his will, or even have known themselves what the paper was, provided they subscribed the instrument in his presence, and at his request.[1] An attestation by a marksman, or by a witness whose hand is guided by another person, is sufficient in point of law,[2] though highly injudicious on account of the difficulty of proof in the event of death. In one case a will appeared to be attested by three witnesses. Two of them were dead, and their signatures were proved, but the third was a marksman, who could not be identified. Under these circumstances, the Court held, that though the handwriting of the testator and the mark of the third witness were not proved, the jury were warranted in presuming the due execution of the will, as it did not appear to have been disputed for sixteen years after the testator's death.[3] In another case, witnesses who had signed by marks were held to be identified, by proof that they had lived near the testator, that no other person of the same name resided in the neighbourhood, and that they were illiterate people.[4]

§ 963. This statute does not require that the testator should *subscribe* the instrument, but it will be sufficient, if the paper be *signed* by him in any part with his name, or mark,[5] even though his hand be guided by another person;[6] provided only that such

Grayson *v.* Atkinson, 2 Ves. Sen. 455; Stonehouse *v.* Evelyn, 3 P. Wms. 254; Ellis *v.* Smith, 1 Ves. 11; Ilott *v.* Genge, 3 Curt. Ec. R. 173; Dewey *v.* Dewey, 1 Metc. 349.

[1] White *v.* Trustees of British Museum, 6 Bing. 310; 3 M. & P. 689, S. C.; Wright *v.* Wright, 7 Bing. 457; 5 M. & P. 316, S. C.; Johnson *v.* Johnson, 1 Cr. & M. 140; 2 Tyr. 73, S. C.; Ilott *v.* Genge, 3 Curt. Ec. R. 173; Dewey *v.* Dewey, 1 Metc. 349.

[2] Harrison *v.* Harrison, 8 Ves. 185; Doe *v.* Caperton, 9 C. & P. 112; Harrison *v.* Elvin, 3 Q. B. 117; Doe *v.* Davies, 9 Q. B. 648; Roberts *v.* Phillips, 4 E. & B. 450. See in re Kilcher, 6 Ec. & Mar. Cas. 15; & post, § 974.

[3] Doe *v.* Davies, 9 Q. B. 648. See ante, § 128, and post, § 970.

[4] Doe *v.* Caperton, 9 C. & P. 112, per Alderson, B.

[5] Baker *v.* Dening, 8 A. & E. 94; 3 N. & P. 228, S. C. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; id. Sealing a will is not a sufficient signing, Smith *v.* Evans, 1 Wils. 313; Grayson *v.* Atkinson, 2 Ves. Sen. 459, per Lord Hardwicke.

[6] Wilson *v.* Beddard, 12 Sim. 28.

signature appear to have been made animo perficiendi, and to have been regarded by him as a complete execution. Thus, where the will was signed in the margin only,—or where, being written by the testator himself, his name appeared only at the commencement, "I, A. B., &c.,"—this was held a good signing.[1] So, it is sufficient if the will be signed by any person in the testator's presence, and by his direction, and, in order to constitute a direction, it is not necessary that anything should be said.[2] Where it appeared that the testator intended to sign each several sheet of the will, but signed only two of them, being unable from extreme weakness to sign the others, the instrument was held to be incomplete.[3] It may here be added, that *direct evidence* of all the requisites contained in the Act is not indispensable to prove the validity of a will; but the attestation in the presence of the testator, the genuineness of the signatures of some of the witnesses, the capacity of the testator, or the like, may be presumed from circumstantial evidence, where the omission to give direct testimony is satisfactorily explained.[4]

§ 964. The *New Will Act*,[5]—which came into operation on the 1st of January, 1838, and which extends to the testamentary papers of domiciled Englishmen, even when made in foreign countries,[6]—has effected extensive amendments in the law respecting these instruments; and it will here be expedient to notice such of the alterations as relate to the *execution of wills.* By this Act, every will, codicil, or other testamentary disposition,—including appointments made by will, or by writing in the nature of a will, in exercise of any power,[7] but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual

[1] Lemayne v. Stanley, 3 Lev. 1; Morrison v. Turnour, 18 Ves. 183. See ante, § 939.

[2] Wilson v. Beddard, 12 Sim. 33, 34, per Shadwell, V.-Ch.

[3] Right v. Price, 1 Doug. 241. See Winsor v. Pratt, 2 B. & B. 650; 5 Moore, 282, S. C.

[4] Doe v. Davies, 9 Q. B. 650, per Lord Denman, recognising Croft v. Pawlet, 2 Stra. 1109; and Hands v. James, Com. Rep. 531. See § 128, ante, and § 970, post.

[5] 7 Will. 4 & 1 Vict., c. 26.

[6] Croker v. Marq. of Hertford, 4 Moore, P. C. R. 339.

[7] §§ 1 & 10.

military service, or by seamen and mariners at sea,[1]—must, if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st of January, 1838,[2] be in writing, "and be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."[3] Appointments by will, if executed in this manner, are valid, although the power, under which they were made, expressly requires some additional solemnity in the execution;[4] and all wills, executed as above stated, shall be deemed good without other publication.[5]

§ 965. An exception, indeed, is recognised as to the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and moneys payable in respect of services in her Majesty's Navy;[6] for, with the view of preventing frauds, to which seafaring men are supposed to be more than ordinarily subject, these wills must be drawn, executed, and attested in a more formal manner than instruments made by other persons, who are presumed to have greater experience.[7]

§ 966. In contrasting these provisions with those contained in the Statute of Frauds, it will be observed, first, that they are not con-

[1] § 11. As to nuncupative wills, see 1 Will. on Ex. 82—89. [2] § 34.

[3] § 9. § 7 of the Indian Will Act, No. 25, of 1838, contains the same language, with the single omission of the words "shall attest and" after "witnesses," and before "shall subscribe." This alteration makes no difference in the construction, per Ld. Brougham in Casement v. Fulton, 5 Moo. P. C. R. 137.

[4] § 10. See, however, and compare Buckell v Bleakhorn, 5 Hare, 131; Collard v. Sampson, 16 Beav. 543; S. C. on appeal, 4 De Gex, M. & Gord. 224; and West v. Ray, 1 Kay, 385.

[5] § 13. As to the meaning of the phrase "publication of a will," see Vincent v. Bp. of Sodor and Man, 4 De Gex & Sm. 294, and cases there cited. [6] § 12. [7] 11 Geo. 4 & 1 Will. 4, c. 20, §§ 48—50.

fined, as in the Act of Charles II., to devises disposing of freehold realty, but that they apply equally to all wills, whether of *freehold, copyhold, or personal estate;* secondly, that two attesting witnesses are sufficient and necessary in all cases, while the Statute of Frauds required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge his signature in the *actual contemporaneous presence* of these witnesses, though this was not necessary under the former Act; and fourthly, that the will must be signed "at the foot or end thereof," whereas, in former wills, the signature was valid, if it appeared on any part of the instrument.[1] It has been further laid down as a rule deducible from the spirit, if not from the express language, of the Act, that both the attesting witnesses must *subscribe* the will *at the same time,* and *in each other's presence;* and therefore, where a will was signed in the presence of a single witness who then attested it,—and subsequently, the testator, in the presence of this witness and another, acknowledged his signature, whereupon the second witness also subscribed the will,—this was held to be insufficient, though on the second occasion the first witness had acknowledged, but had not rewritten, his own signature.[2] So, where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen, the Court held this was not a sufficient compliance with the statute, which, in requiring the actual subscription of the witnesses, rendered it incumbent on them to do some act that should be apparent on the face of the instrument.[3]

§ 967. As the word "presence," mentioned in the statute,

[1] Post, § 971.

[2] Casement *v.* Fulton, 5 Moo. P. C. R. 130; Moore *v.* King, 3 Curteis, 243; in re Simmonds, id. 79; in re Allen, 2 Curt. 331; Slack *v.* Rusteed, 6 Ir. Eq. R., N. S., 1. See, however, Faulds *v.* Jackson, 6 Ec. & Mar. Cas. Supp. i.; and in re Webb, 1 Deane, Ec. R., 1, in which last case, Sir John Dodson, on the authority of an unreported decision of Sir H. Jenner Fust, in Chodwick *v.* Palmer, held that the witnesses need not subscribe the will in the presence of each other. Therefore, quære.

[3] Playne *v.* Scriven, 7 Ec. & Mar. Cas. 122, per Sir H. J. Fust; 1 Roberts., Ec. R., 772, S. C. See post, § 1016.

means not only a bodily, but a mental presence, the Act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind or inattentive, at the time when the will is signed or acknowledged;[1] and so strictly has this rule been interpreted, that where a testator had acknowledged a paper to be his will in the presence of witnesses, but these persons had neither seen him sign it, nor seen his signature at the time of their subscription, a prayer for probate was rejected, though both the witnesses admitted that they had seen the testator writing the paper, and the will, when produced, actually bore his signature.[2]

§ 968. A somewhat less stringent construction has been put on that part of the Act which requires the witnesses to subscribe in the presence of the testator; and, although, if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have seen them write,[3] yet where the testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence, the will was admitted to probate.[4] This distinction has been adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.[5]

§ 969. In enacting that the testator must "make or acknow-

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[1] Hudson v. Parker, 1 Roberts., 24, per Dr. Lushington. [2] Id. 14.

[3] Norton v. Barett, 1 Deane, Ec. R., 259.

[4] Newton v. Clarke, 2 Curt. 320. But see Tribe v. Tribe, 7 Ec. & Mar. Cas. 132; 1 Roberts., Ec. R., 775, S. C.

[5] Hudson v. Parker, 1 Roberts., 35, 36, per Dr. Lushington.

ledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the signature was made "by some other person" than the testator, but meant it to apply equally to those cases where the signature had been previously made by himself.[1] In making the acknowledgment, it is not necessary that the testator should actually point out to the witness his name, and say "this is my name or my handwriting;" but if he states that the whole instrument was written by himself,[2] or if he produces a paper as his will, and requests the witnesses to put their name *underneath his*,[3] or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,[4] or even, it seems, if he shows a paper in his handwriting to the witnesses and desires them to sign it, without stating that such paper is his will,[5] this will be a sufficient acknowledgment of his signature, provided it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen by the witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses, before they subscribed the will, either saw the testator sign it, or saw his signature attached to it, he must pronounce against its validity; for the statute requires, not that the *will*, but that the *signature*, should be attested.[6] It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator immediately afterwards affixes his signature in their presence, and though they subsequently seal the document.[7]

[1] In re Cornelius Ryan, 1 Curt. 908, recognised in Ilott v. Genge, 3 Curt. 174.

[2] Blake v. Knight, 3 Curt. 563.

[3] Gaze v. Gaze, 3 Curt. 451.

[4] In re Davies, 2 Roberts., Ec. R., 377.

[5] Keigwin v. Keigwin, 3 Curt. 607; in re Ashmore, id. 758, per Sir H. J. Fust; in re Bosanquet, 2 Roberts., Ec. R., 577; in re Dinmore, id. 641; in re Jones, 1 Deane, Ec. R., 3. See Faulds v. Jackson, 6 Ec. & Mar. Cas. Supp. x., per Ld. Brougham.

[6] Hudson v. Parker, 1 Roberts. 14; Ilott v. Genge, 3 Curt. 175, 181; Countess de Zichy Ferraris v. Marq. of Hertford, 3 Curt. 479; in re Summers, 7 Ec. & Mar. Cas. 562; 2 Roberts., Ec. R., 295, S. C.

[7] In re Byrd, 3 Curt. 117; in re Olding, 2 id. 865; Cooper v. Bockett, 3 id. 648; 4 Moore, P. C. R. 419, S. C.

§ 970. But it is not absolutely essential to the validity of a will, that positive affirmative evidence should be given by the subscribing witnesses, that the testator either signed it, or acknowledged his signature to it, in their presence, since the Court may *presume due execution* under the circumstances.[1] Thus, where, three years after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was presumed to be conversant with business, to see him sign his will; that he then produced a paper, telling them that it was his will and in his handwriting; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument; that he did not sign in their presence, that when they attested the paper no seal was upon it, but they could not positively swear that there was no signature; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed.[2] So, also, if the will contains an attestation clause, and purports to be duly signed by the testator and two witnesses, the Court will primâ facie presume, in the absence or death of the witnesses, or in the event of their not remembering the facts attendant on the execution, that the statute has been complied with, and that omnia ritè esse acta.[3]

§ 971. It was at one time thought, that the clause requiring the testator to sign "at the foot or end" of the testament would be satisfied, though the will itself were wholly written on the first side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side.[4] This sensible view of the law has constantly been entertained by the judges in Ireland;[5] but unfortunately in England a far more strict construction was ultimately put upon the words of the Act, and the

[1] See ante, §§ 128, 963.

[2] Blake v. Knight, 3 Curt. 547, 562.

[3] Burgoyne v. Showler, 1 Roberts., Ec. R. 5, per Dr. Lushington; Hitch v. Wells, 10 Beav. 84; in re Leach, 6 Ec. & Mar. Cas. 92, per Sir H. J. Fust; Leech v. Bates, 1 Roberts., Ec. R., 714; Brenchley v. Still, 2 id. 162, 175—177; Thomson v. Hall, 2 id. 426; Foot v. Stanton, 1 Deane, Ec. R. 19.

[4] In re Gore, 3 Curt. 758; in re Carver, id. 29.

[5] Derinzy v. Turner, 1 Ir. Eq. R., N. S., 341.

consequence was that very many wills, which unquestionably ought to have been admitted to proof, were refused probate, because the testator had inadvertently permitted a trifling blank space to be interposed between the final word of the instrument and his signature.[1] The mischiefs caused by this most injudicious interpretation of the statute became at last so serious as to require the interference of the Legislature; and in 1852, Lord-Chancellor St. Leonards, to his very great credit, obtained the assent of Parliament to an Act,[2] which, if it be not drawn by the hand of a master, will at least have the effect of remedying the principal evils that arose from the former law.

§ 972. The first section of this Act,—after reciting that under the statute 7 Will. 4 & 1 Vict., c. 26, no will is valid unless it be "signed at the foot or end thereof by the testator or by some person in his presence, and by his direction,"—goes on to enact, that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circum-

[1] See Smee v. Bryer, 6 Moo. P. C. R. 404; 6 Ec. & Mar. Cas. 20, 406, and Supp. xli. to same vol., S. C.; in re Howell, 6 Ec. & Mar. Cas. 555; in re Corder, id. 556; in re Attridge, id. 597. Where the testator signed the will between the testimonium clause and certain words descriptive merely of the witnesses, probate was granted; in re Cotton, 6 Ec. & Mar. Cas. 307. See also in re Beadle, 1 Roberts., Ec. R., 749; 7 Ec. & Mar. Cas. 43, S. C.; in re Standley, 1 Roberts, Ec. R., 755; 7 Ec. & Mar. Cas. 69, S. C.; in re Brown, 1 Roberts., Ec. R., 710; in re Banly, id. 751; in re Hellings, id. 753; in re Hearn, 2 Roberts., Ec. R., 112; 7 Ec. & Mar. Cas. 266, S. C.; in re Odell, 7 Ec. & Mar. Cas. 267—271; in re Batten, id. 288; 2 Roberts., Ec. R., 124, S. C.; Holbeck v. Holbeck, 7 Ec. & Mar. Cas. 294; 2 Roberts., Ec. R., 126, S. C.; in re Minty, 7 Ec. & Mar. Cas. 374—378; cases collected, id. 543—552; in re Hill, 2 Roberts., Ec. R., 114; in re White, id. 194.

[2] 15 & 16 Vict., c. 24.

stance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."[1]

§ 973. Although the testator for obvious reasons is required to sign the will "at the foot thereof," it is somewhat remarkable that the New Will Act points out no place for the signature of the witnesses. The most convenient, and therefore the most proper, place undoubtedly is under, or by the side of, the signature of the testator; but the selection of such a locality is by no means essential; and a testament has been deemed duly executed, even where the attestation clause and the signatures of the witnesses were indorsed upon it.[2]

§ 974. Under the New Will Act, as under the Statute of Frauds, the testator may sign by his mark only, though his name does not appear in the body of the will;[3] and the attesting

[1] These provisions apply to wills already made; see § 2.

[2] In re Chamney, 7 Ec. & Mar. Cas. 70; 1 Roberts., Ec. R., 757, S. C. See in re Taylor, 2 Roberts., Ec. R., 411.

[3] In re Bryce, 2 Curt. 325. See ante, § 963.

witnesses, whether they can write or not, may also sign as marksmen;[1] and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.[2] It has even been held sufficient for witnesses to subscribe the will by their initials.[3] In conformity also with the provisions in the New Will Act that "no form of attestation shall be necessary," it has been held that a mere subscription of two names without any memorandum to show that the parties have subscribed as witnesses will satisfy the requirements of the statute.[4] Again, under either Act, any person, even though he be one of the two attesting witnesses, may sign for the testator by his direction;[5] and where the drawer of a will, being requested by the testator to sign for him, put *his own* signature to the instrument, this was held to be sufficient, as the Act does not say that the signature must bear the testator's name.[6] The witnesses, however, must attest the will, either by their signatures or their marks, and probate has been refused when a stranger, at the request of the testator, signed for one of the witnesses who was unable to write.[7]

§ 975. It may be stated, with regard to the incorporation of papers in wills, that here, as in other documents, a paper imperfect in itself may, by *clear reference*, be so identified with an instrument validly executed as to form part of it, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.[8] Unattested wills and codicils have

[1] In re Amiss, 2 Roberts., Ec. R., 116. See ante, § 962.

[2] Harrison *v.* Elvin, 3 Q. B. 117; in re Frith, 27 L. J., Pr. & Mat. Cts. 6. See ante, § 962.

[3] In re Christian, 7 Ec. & Mar. Cas. 265, per Sir H. J. Fust; 2 Roberts., Ec. R., 110, S. C. See in re Trevanion, 2 Roberts., Ec. R., 311.

[4] Bryan *v.* White, 2 Roberts., Ec. R., 315.

[5] Smith *v.* Harris, 1 Roberts., Ec. R. 262; in re Bailey, 1 Curt. 914; ante, § 963.

[6] In re Clark, 2 Curt. 329. See also in re Blair, 6 Ec. & Mar. Cas. 528.

[7] In re Cope, 2 Roberts., Ec. R., 335.

[8] Countess de Zichy Ferraris *v.* Marq. of Hertford, 3 Curt. 493, per Sir H. J. Fust; in re Lady Durham, id. 57; in re Dickins, id. 60; in re Willerford, id. 77; Habergham *v.* Vincent, 2 Ves. 204; in re Edwards, 6 Ec. & Mar. Cas. 306; in re Ash, 1 Deane, Ec. R. 181; in re Lady Pembroke, id. 182. See ante, § 937.

thus constantly been set up by subsequent attested codicils which have confirmed them.[1] Where, however, a testator at the foot of a valid will of 1833 made two codicils prior to the 1st of January, 1838, and five more after that date, the whole seven being unattested, and then in 1847 duly executed an eighth codicil on a separate paper, which he described as "a codicil to his *will*," the Court held that the five unattested codicils, which bore date after the passing of the New Will Act, were not rendered valid by the eighth codicil, as they formed no part of the testator's will, legally and technically speaking.[2]

§ 976. With respect to § 11, which excepts from the operation of the Act, all wills of personal estate made by "any soldier being in actual military service, or any mariner or seaman being at sea," it has been determined, first, that the word "soldier" includes all officers and common soldiers in the employ of the East India Company, as well as those in her Majesty's service;[3] secondly, that the privilege, as to soldiers, is confined to such as are actually *on an expedition;*[4] and consequently that officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception;[5] thirdly, that the Act applies to seamen in the merchant, as well as in the Queen's service,[6] and that the purser of a man-of-war is included in the term "seamen;"[7] fourthly, that the exception extends to a naval captain on board a Queen's ship in a *river*, provided he be actually engaged in a naval expedition;[8] but lastly, that it does not extend to an admiral in command of a

[1] Aaron v. Aaron, 3 De Gex & Sm. 475; Utterton v. Robins, 1 A. & E. 423; Gordon v. Ld. Reay, 5 Sim. 274; Doe v. Evans, 1 C. & M. 42; 3 Tyr. 56, S. C.

[2] Haynes v. Hill, 7 Ec. & Mar. Cas. 256. See also Johnson v. Ball, 5 De Gex & Sm. 85.

[3] Shearman v. Pyke, cited 3 Curt. 539—542.

[4] See Herbert v. Herbert, 1 Deane, Ec. R. 10.

[5] Drummond v. Parish, 3 Curt. 522, 542; in re Hill, 1 Roberts. 276; White v. Repton, 3 Curt. 818; Bowles v. Jackson, 1 Ec. & Mar. Cas. 294.

[6] In re Milligan, 2 Roberts., Ec. R., 108.

[7] In re Hayes, 9 Curt. 338.

[8] In re Admiral Austen, 3 Roberts., Ec. R., 611.

fleet in the colonies, who lives with his family on shore at his official residence.[1]

§ 977.[2] Under the Statute of Frauds, the *express revocation* of a will devising freehold lands or tenements, if effected before the 1st January, 1838, must be proved, either by the production of some subsequent will or codicil inconsistent with the former, or of some other writing declaring the revocation, and signed in the presence of three witnesses; or by evidence of burning, tearing, cancelling, or obliterating the will by the testator, or in his presence, and by his direction and consent.[3] It is observable that this part of the statute requires that the instrument of revocation should be signed by the testator in the presence of the witnesses, though this was not necessary in executing the will itself; but it does not require, as in the execution of a will, that the witnesses should sign in the testator's presence.[4]

§ 978. This statute left the law of *implied revocations* untouched; and, consequently, a devise of real estate by an unmarried man, equally with his will of personalty, was, previously to the New Will Act, revoked by marriage and the birth of a child, whether the birth took place in the testator's lifetime or after his decease.[5] When this rule was first introduced it was thought to be founded on an implied intention of the testator to revoke the will in consequence of the altered circumstances of his family, and, consequently, the Courts were in the habit of receiving parol evidence of his declarations, or of other circumstances tending to show what his real intention was, and thus to rebut the presumption of revocation.[6] Moreover, the rule was considered inapplicable, unless the will disposed of the whole estate, and left the wife and

[1] Lord Euston *v.* Lord Hy. Seymour, cited 2 Curt. 339, and recognised in Drummond *v.* Parish, 3 Curt. 530.

[2] Gr. Ev., § 273, in part.

[3] 29 Car. 2, c. 3, § 6; 7 Will. 3, c. 12, § 3, Ir.

[4] Onions *v.* Tyrer, 1 P. Wms. 343.

[5] Overbury *v.* Overbury, 2 Show. 242; Christopher *v.* Christopher, 4 Burr. 2171 n., 2182 n.; Doe *v.* Lancashire, 5 T. R. 49.

[6] See Fox *v.* Marston, 1 Curt. 494; Johnston *v.* Johnston, 1 Phillim. 447, 469, 473.

child entirely without provision.[1] Subsequently, other views were entertained; the doctrine of implied intention was rejected; and the rule was declared to be the consequence of a condition tacitly annexed by law to the execution of a will, that, in the event of the testator's subsequent marriage and the birth of a child, the will should ipso facto become void.[2] No evidence of intention was therefore admissible to rebut the revocation, and keep the instrument alive, and the question of provision or of non-provision for the wife and child became wholly immaterial.[3] This doctrine, in the few cases to which it can still apply, is now undoubted law, every will being regarded as absolutely revoked when the testator has subsequently married and had issue.[4]

§ 979. Returning to the acts of revocation mentioned by the statute, it is not intended to discuss them at any length, because the new system having now been in operation for a considerable number of years, it is not probable that questions relating to the revocation of wills under the old system will in future often be raised. Two cases, however, may be noticed, which strikingly illustrate the defects of the former law. A testator, much under the influence of his niece, who lived with him as housekeeper, left her by his will some freehold and copyhold estates. The parties frequently quarrelled, and on one occasion, when irritated, the testator threw the will upon the fire, but the devisee rescued it without his knowledge, at which he expressed his displeasure when informed of it. The envelope was partially burnt, but the will itself was not so much as singed. The devisee kept it till after the testator's death, when two actions of ejectment were

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[1] Kenebel v. Scrafton, 2 East, 530, 541; Brady v. Cubitt, 1 Doug. 39, 40; Ex parte Lord Ilchester, 7 Ves. 348.

[2] Marston v. Roe d. Fox, 8 A. & E. 14. In this case, which was decided by all the judges, except Lord Denman, Tindal, C. J., thus lays down the law:—"In the case of the will of an unmarried man having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation." p. 60. See also Israell v. Robson, 2 Moo. P. C. R. 51, 63, 64; Walker v. Walker, 2 Curt. 854; Matson v. Magrath, 1 Roberts. 680.

[3] See cases in last note.

[4] In re Cadywold, in Ct. of Prob., per Sir C. Cresswell, 2nd March, 1858, MS.

brought against her by the son-and-heir of the testator. In the first, by which the lessor of the plaintiff sought to recover the freehold property, the Court held that there had been no revocation sufficient to satisfy the Statute of Frauds, which rendered necessary a burning of the will itself, at least to some extent;[1] but in the second, which related to the copyhold estate, and which, consequently, was not governed by the statute, the revocation was adjudged to be complete, because the revocation at common law only required evidence of intention, and such evidence might be found in an imperfect act, or a mere attempt.[2] The result, of course, was, that the lessor of the plaintiff failed in the first case, but succeeded in the last.

§ 980. A law that could warrant decisions thus flagrantly inconsistent was in no slight want of amendment; and the New Will Act, by placing the revocation of *all* wills on the same footing, has effectually remedied this particular evil. The Act further provides, with respect to revocation, "that every will made by a man or woman shall be *revoked* by his or her *marriage*, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions;"[3] and "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances;"[4] and "that no will, or codicil, or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required,[5] or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."[6]

[1] Doe *v.* Harris, 6 A. & E. 209; 1 N. & P. 405, S. C.
[2] Doe *v.* Harris, 8 A. & E. 1, 12.
[3] 7 Will. 4 & 1 Vict., c. 26, § 18.
[4] § 19. [5] Ante, § 964. [6] § 20.

§ 981. In order to revoke a former will by a later one, no revocation clause is necessary; but any paper duly executed, by which the testator disposes of his *whole* property, is a revocation in toto of all previous wills. This doctrine has been held applicable, even where the last testamentary paper contained no appointment of executors;[1] and in one case, where a testator by his "*last will*," in which executors were appointed, disposed of *part* of his personalty, a former will was held to be revoked, though it contained provisions not wholly inconsistent with the later instrument.[2] Little weight however can now be attached to this decision; for, in the first place, it appears clear that the phrase "last will" will simply be regarded as one of form;[3] and next, it must be borne in mind, that according to a maxim, which has recently received the solemn sanction of the Court of last resort, a former will cannot be revoked by one of later date, unless the later instrument contains a clause of express revocation, or unless the two wills are incapable of standing together.[4] The onus of establishing the revocation lies on the party who impeaches the first will; and no inference in his favour can be drawn from the mere fact that the later instrument contains equivocal expressions, or that the legacies bequeathed by it are *partially* inconsistent with prior testamentary dispositions.[5] Where a jury found that a second will, which was not produced, contained a different disposition of real estate from a former one, "but in what particulars is unknown," the House of Lords, on writ of error, decided that the first will was not revoked, so as to let in the title of the heir at law.[6] In another case, where a testator, many years after making a will of personal property, executed another paper,

[1] Henfrey *v.* Henfrey, 4 Moo. P. C. R. 29; 2 Curt. 468, S. C., in court below.

[2] Plenty *v.* West, 1 Roberts. 264. See also S. C. in Chancery, before Romilly, M. R., 22 L. J., Ch., 185.

[3] Stoddart *v.* Grant, 1 Macq. Sc. Cas., H. of L., 171, per Lord Truro; Freeman *v.* Freeman, 5 De Gex, M. & Gord. 704.

[4] Stoddart *v.* Grant, 1 Macq. Sc. Cas., H. of L., 163.

[5] Id. See also Doe d. Hearle *v.* Hicks, 1 Cl. & Fin. 20; Doe *v.* Ward, 18 Q. B. 197; Williams *v.* Evans, 1 E. & B. 727; Freeman *v.* Freeman, 23 L. J., Ch., 838; 1 Kay, 479; 5 De Gex, M. & Gord. 704, S. C.

[6] Goodright *v.* Harwood, 2 Wm. Bl. 937; 3 Wils. 497, S. C. See Thomas *v.* Evans, 2 East, 488; Brown *v.* Brown, 4 Jur., N. S., 163, Q. B.; in re Brown, 30 Law Times, 353, Ct. of Prob.

which was proved to have commenced with the words, "This is the last will and testament," but its further contents were utterly unknown, and after the testator's death it was not forthcoming, the judicial committee of the privy council held that the prior will remained unrevoked, and was entitled to probate.[1] It would seem also that the re-execution of a will, even though it contain a clause of revocation, will not in general be deemed to have revoked any of its codicils; for, unless the contrary appear to have been the intention of the testator, the Court of Probate will hold, that all the codicils have been republished by the re-execution of the principal instrument.[2]

§ 982. With respect to the revocation of a will by its destruction, it should be observed that a testator cannot, under the Act of Victoria, revoke his will by authorising any person to destroy it *out of his presence;* and it follows as a corollary from this proposition, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.[3]

§ 983. It is difficult to fix à priori what extent of *burning* or *tearing* will amount to the revocation of a will under the Act of Victoria or the Statute of Frauds. It is clear that under neither statute will the revocation be complete, unless the act of spoliation be deliberately done upon the instrument, animo revocandi.[4] This is expressly rendered necessary by the New Will Act,[5] and was impliedly required by the statute of Charles.[6] It is further clear, on general principle, that the declarations of the testator, accompanying the act of spoliation, will be admissible in evidence as explanatory of his intention.[7] Still the question remains, Must there be a total or substantial burning or tearing of the writing itself, or will the revocation be complete, if the testator, intending

[1] Cutto v. Gilbert, 9 Moo. P. C. R. 131.
[2] Wade v. Nazer, 6 Ec. & Mar. Cas. 46.
[3] Stockwell v. Ritherdon, 6 Ec. & Mar. Cas. 409, 414, per Sir H. J. Fust.
[4] See in re Cockayne, 1 Deane, Ec. R. 177.
[5] Ante, § 980.
[6] Bibb v. Thomas, 2 Wm. Bl. 1044.
[7] Dan v. Brown, 4 Cowen, 490; Clarke v. Scripps, 2 Roberts. 568.

to revoke, tears or burns a portion of the paper on which the will is written, but does not destroy or deface any part of the writing?[1] In an old case, the testator having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, but a by-stander saved it without his knowledge, before, as it seems, it was at all burnt; the Court held that the revocation was complete;[2] and a similar decision has been come to in America, where a testator had torn off a superfluous seal.[3] However, it has since been doubted whether the proof given in the English case was sufficient to satisfy the statute;[4] and where a testator being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards he fitted together, and put by, the several pieces, saying he was glad it was no worse; the Court refused to disturb a verdict, by which the jury had found that the act of cancellation was incomplete, as the testator, had he not been stopped, would have gone further in the process of destruction.[5] The *cutting* out the signature by the testator has been held to effect a revocation of the will, if not under the word "tearing," at least under the terms "or otherwise destroying the same."[6] Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and the attesting witnesses remained uninjured, the Court, guided by the peculiar nature of the mutilations, held, in the absence of any extrinsic evidence, that the instrument was not revoked.[7]

§ 984. The Act of Victoria, unlike the Statute of Frauds, omits all mention of "*cancelling*" as one of the modes of revoking a will; and with respect to *obliterating*, it enacts, in § 21, "that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or

[1] See Doe *v.* Harris, 6 A. & E. 215—218; 1 N. & P. 405, S. C.
[2] Bibb *v.* Thomas, 2 Wm. Bl. 1043.
[3] Avery *v.* Pixley, 4 Mass. 462.
[4] Doe *v.* Harris, 6 A. & E. 215, per Lord Denman.
[5] Doe *v.* Perkes, 3 B. & A. 489. [6] Hobbs *v.* Knight, 1 Curt. 768.
[7] Clarke *v.* Scripps, 2 Roberts., Ec. R., 563, per Sir John Dodson.

have any effect, except so far as the words or effect of the will before such alteration shall not be *apparent*, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will;[1] but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will." The word "apparent" here used, does not mean what is capable of being made apparent by extrinsic evidence, but simply applies to what is apparent on the face of the instrument; and, consequently, if a testator entirely obliterates any part of the will, animo revocandi, this must still operate as a revocation of that part, and no evidence dehors the will can be received, in order to show how the defaced passage originally stood.[2] So, it would seem that the erasure by the testator of his own signature, or of the signature of either or both of the witnesses, if done animo revocandi, would amount to a revocation of the whole will, and would in fact be tantamount to its actual destruction.[3] It has already been shown while treating of the law of presumptions,[4] that in the absence of any direct evidence, the law will presume that any alteration or erasure in a will was made after its execution; and, consequently, the Courts will grant a probate of the will in its original form.[5]

§ 985. It has further been determined, notwithstanding the language of § 34,[6] that the provisions of the New Will Act, with respect to the revocation or alteration of wills, apply equally to all wills, whether executed before or after the 1st of January 1838, provided the act of assumed revocation has been done, or the alteration has been made, after that date.[7] Although § 21, cited

[1] See ante, § 964.

[2] Townley v. Watson, 3 Curt. 761, 764, 768, 769; 3 Ec. & Mar. Cas. 17, S. C.

[3] Hobbs v. Knight, 1 Curt. 780, 781, per Sir H. J. Fust.

[4] Ante, § 134.

[5] Cooper v. Bockett, 4 Moore, P. C. R. 419; 4 Ec. & Mar. Cas. 685, S. C.; Greville v. Tylee, 7 Moo. P. C. R. 320.

[6] See ante, § 964.

[7] Hobbs v. Knight, 1 Curt. 768, 774—776; Countess de Zichy Ferraris

above,[1] does not expressly state, that to effect a revocation of the will or of any part of it, the erasure or obliteration must be made with that *intention*, yet the Court has held that here, as under the Statute of Frauds, the animus revocandi is indispensable; and therefore, where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, the Court decreed probate of the will in its original form, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered.[2] What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, no sufficient reason exists for believing that he meant to vary the former gift at all, and the erasure is treated as an act done by mere mistake, sine animo cancellandi.[3]

§ 986. With respect to the *revival* of wills, the statute of Victoria enacts, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;[4] and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."[5] Thus, the destruction of the revoking instrument is no longer sufficient to revive a

v. Marq. of Hertford, 3 Curt. 468; Brooke *v.* Kent, 3 Moore, P. C. R. 334; 2 Curt. 343, S. C. nom. in re Brooke; Croker *v.* Marq. of Hertford, 4 Moore, P. C. R. 339; Androws *v.* Turner, 3 Q. B. 177.

[1] Ante, § 984.

[2] Brooke *v.* Kent, 3 Moore, P. C. R. 334, 349, 350; Burtenshaw *v.* Gilbert, 1 Cowp. 52, per Lord Mansfield; Onions *v.* Tyrer, 1 P. Wms. 343; in re Cockayne, 1 Deane, Ec. R. 177.

[3] Locke *v.* James, 11 M. & W. 901, 910, 911, per Parke, B. See Tupper *v.* Tupper, 1 Kay & J. 665.

[4] See, in re Harker, 7 Ec. & Mar. Cas. 44.

[5] 7 Will. 4 & 1 Vict., c. 26, § 22. See Andrews *v.* Turner, 3 Q. B. 177.

former will;[1] and the question of revival or non-revival from this cause, which under the old system was made to depend on the intention of the testator, as gathered from the circumstances of each particular case,[2] can never again arise, excepting in the event of a second will having been revoked before Jan. 1st, 1838.

§ 987. The next important statute, to which it is necessary to refer, is the one generally known as Lord Tenterden's Act.[3] The first section, which has already been set out and partially discussed in the Chapter *On Admissions*,[4] provides generally,—when read in connexion with § 13 of the Mercantile Marine Act,[5] 1856,—that in actions grounded on simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise* in *writing* to be *signed by the party chargeable thereby*, or by his authorised agent, or by part payment.[6] Considering the endless variety of language in which acknowledgments of debts may be couched, it is obviously impossible to lay down distinct rules of interpretation, by following which the Court[7] will be enabled to arrive at a sound decision in each particular case. Much must, under any circumstances, be left to discretion; yet still that discretion may be materially guided by attending to the following propositions, which appear to be warranted by the most recent decisions. First, the Legislature, in passing the Act, did not intend to alter the legal construction to be put upon acknowledgments or promises made by defendants, but merely required a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses.[8] The inquiry, therefore, whether

[1] Major *v.* Williams, 3 Curt. 432; Brown *v.* Brown, 4 Jur., N. S., 163, Q. B.; in re Brown, 30 Law Times, 353, Ct. of Prob.

[2] James *v.* Cohen, 3 Curt. 782, per Sir H. J. Fust, citing Usticke *v.* Bawden, 2 Add. 125.

[3] 9 Geo. 4, c. 14.

[4] Ante, § 675. See also § 537.

[5] 19 & 20 Vict., c. 97, § 13, cited ante, § 676.

[6] The same law prevails in Ireland; 16 & 17 Vict., c. 113, § 24, as amended by 19 & 20 Vict., c. 97, § 13.

[7] That this is a question for the Court, and not for the jury, see ante, § 36.

[8] See Spollan *v.* Magan, 1 Ir. Law R., N. S., 700, per Monahan, C. J.

in a given case the written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation.[1] Secondly, in order to take a case out of the operation of the statute, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and *unqualified* admission of a still subsisting liability, from which a promise to pay *on request* will be implied by law.[2] Thirdly, a *conditional promise*, in the absence of proof of the fulfilment of the condition, will not suffice; but if such proof be afforded, the promise, whether express or implied, will be converted into an absolute one, and as such will support a declaration averring a promise to pay on request.[3] In the case of a conditional promise the statute begins to run, not from the date of the promise, but from the time when the condition is fulfilled.[4]

§ 988. Fourthly, since a mere acknowledgment of a debt, which does not amount in law to an implied promise to pay, will not take the case out of the Statute of Limitations, it would seem on principle to follow,—though several authorities throw much doubt on the subject,[5]—that an admission to a *stranger* that a sum is due

[1] Haydon *v.* Williams, 7 Bing. 166, 167, per Tindal, C. J.; 4 M. & P. 811, S. C.

[2] Morrell *v.* Frith, 3 M. & W. 405, per Parke, B.; Bucket *v.* Church, 9 C. & P. 212, per id.; Tanner *v.* Smart, 6 B. & C. 609, per Lord Tenterden; Smith *v.* Thorne, 21 L. J., Q. B., 199; 18 Q. B. 134, S. C.; Goate *v.* Goate, 1 H. & N. 29; Brigstocke *v.* Smith, 1 Cr. & Mee. 486, per Bayley, J.; Hart *v.* Prendergast, 14 M. & W. 741, 745, 746. In this case Alderson, B., questioned Gardner *v.* M'Mahon, 3 Q. B. 561; 2 G. & D. 593, S. C. In Prance *v.* Sympson, 1 Kay, 678, Wood, V. C., held that the statute was ousted by a written acknowledgment that an account was pending, coupled with a promise to pay the balance, if any should be found due from the writer. See Hughes *v.* Paramore, 24 L. J., Ch., 681; 7 De Gex, M. & Gord. 229, S. C.

[3] Humphreys *v.* Jones, 14 M. & W. 1, 3; Hart *v.* Prendergast, id. 745, 746.

[4] Waters *v.* E. of Thanet, 2 Q. B. 757; Maunsell *v.* Hedger, 2 Ir. Law R., N. S., 88.

[5] See Clark *v.* Hooper, 10 Bing. 481, per Tindal, C. J., and Park, J.; 4 M. & Scott, 353, S. C.; Eicke *v.* Nokes, 1 M. & Rob. 359, per Tindal, C. J.; Peters *v.* Brown, 4 Esp. 46, per Lord Kenyon; Smith *v.* Poole, 12

will not suffice;[1] but the question is still undecided, whether an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, can be made available to defeat the Statute of Limitations by a subsequent holder of the note, as amounting to a promise to pay the note according to its tenor and effect, that is, to the payee or his order.[2] Fifthly, a general written promise to pay, not specifying any amount, or an absolute admission of *some* debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages.[3] Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence.[4] Seventhly, even an infant, by giving a written acknowledgment of a debt due for *necessaries*, will take the debt out of the statute.[5] Eighthly, the promise, acknowledgment, or part payment, must be made before action brought, since they severally bar the statute, not as was formerly supposed, upon the ground of their rebutting the presumption of payment, but because they amount to a new promise.[6] Lastly, the promise

Sim. 17; Spollan *v.* Magan, 1 Ir. Law R., N. S., 691; M'Carthy *v.* O'Brien, 2 Ir. Law R. 67; Morrogh *v.* Power, 5 id. 494.

[1] Grenfell *v.* Girdlestone, 2 You. & Coll., Ex. R., 676, per Alderson, B. See post, 1004.

[2] Cripps *v.* Davis, 12 M. & W. 159; Mountstephen *v.* Brooke, 3 B. & A. 141.

[3] Spong *v.* Wright, 9 M. & W. 633, per Alderson, B.; Lechmere *v.* Fletcher, 1 Cr. & Mee. 623; 3 Tyr. 450, S. C.; Cheslyn *v.* Dalby, 4 You. & Coll., Ex. R., 238; Waller *v.* Lacy, 1 M. & Gr. 54, 71; 8 Dowl. 563; 1 Scott, N. R. 186, S. C.; Dickinson *v.* Hatfield, 1 M. & Rob. 141, per Lord Tenterden; 5 C. & P. 46, S. C.; Bewley *v.* Power, Haynes & Jon., Ex. R. Ir., 368; Shickernell *v.* Hotham, 1 Kay, 669. These cases overrule the dicta of the Court in Kennett *v.* Milbank, 8 Bing. 38. See Hartley *v.* Wharton, 11 A. & E. 934; 3 P. & D. 529, S. C.; post, § 1004; and ante, § 936.

[4] Hartley *v.* Wharton, 11 A. & E. 934; 3 P. & D. 529, S. C.; Edmunds *v.* Downes, 2 Cr. & Mee. 459; 4 Tyr. 173, S. C. See Lobb *v.* Stanley, 3 Q. B. 574.

[5] Williams *v.* Smith, 24 L. J., Q. B., 62; S. C. nom. Willins *v.* Smith, 4 E. & B. 180. See post, § 997.

[6] Bateman *v.* Pinder, 3 Q. B. 574, overruling Yea *v.* Fouraker, 2 Burr. 1099.

proved, whether express or implied, must correspond with that laid in the declaration;[1] and therefore, an acknowledgment made to or by an executor or administrator will not support a count laying the promise to or by the testator or intestate;[2] and where an action was brought against a man and his wife and a third person, on a joint note made by the third person and the lady before her marriage, an acknowledgment by the third person after the marriage of the lady, was held not to support an issue joined on the Statute of Limitations, the promise laid in the declaration being by the third person and the lady before her marriage.[3]

§ 989. In accordance with the second and third rules stated above, letters, in substance as follows, have been held insufficient, as not amounting to *unqualified acknowledgments.* "I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive;"[4]—"I have been expecting to be able to give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter;"[5]—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you;"[6]—"I owe the money, but I will never pay it;"[7]—"I admit as executor your claim on the estate, and think it just, but I am compelled to refuse payment as the legatees object;"[8]—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance;"[9]—"I send you an account of some debts due

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[1] Tanner *v.* Smart, 6 B. & C. 608, 609, per Lord Tenterden; Cripps *v.* Davis, 12 M. & W. 167, per Parke, B.

[2] Sarell *v.* Wine, 3 East, 409; Browning *v.* Paris, 5 M. & W. 120, per Parke, B.; Tanner *v.* Smart, 6 B. & C. 608, 609.

[3] Pittam *v.* Foster, 1 B. & C. 248; 2 D. & R. 363, S. C.; Neve *v.* Hollands, 18 Q. B. 262.

[4] Fearn *v.* Lewis, 6 Bing. 349; 1 M. & P. 1, S. C.

[5] Morrell *v.* Frith, 3 M. & W. 402; 8 C. & P. 246, S. C.; Hamilton *v.* Terry, 11 Com. B. 954; Cawley *v.* Furnell, 12 Com. B. 291.

[6] Linsell *v.* Bonsor, 2 Bing. N. C. 241; 2 Scott, 399, S. C.

[7] A'Court *v.* Cross, 3 Bing. 329.

[8] Briggs *v.* Wilson, 5 De Gex, M. & Gord. 12, 21.

[9] Hart *v.* Prendergast, 14 M. & W. 741; Smith *v.* Thorne, 21 L. J., Q.

to me; collect them, and pay yourself, and you and I shall then be clear;"[1]—"Arrangements have been made to enable me to discharge your debt; funds have been appointed for that purpose, of which A. is trustee, and to him I refer you for further information;"[2]—"Send me in any demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law;"[3]—"I will not pay your demand, for it is of more than six years' standing."[4]

§ 990. So, the following *conditional acknowledgments* have been deemed insufficient, in the absence of proof that the condition has been fulfilled:—"I cannot pay the debt now, but I will as soon as I can;"[5]—"We are waiting a remittance from Liverpool against beef we sent to sell; when it comes, we shall send you the amount of the bill;"[6]—"I shall be most happy to pay you principal and interest as soon as convenient."[7]

§ 991. On the other hand, cases have been taken out of the operation of the statute, when the letters, in substance, contained such expressions as the following:—"I can never be happy till I have paid you; your account is correct, and would that I were now going to inclose the amount;"[8]—"I wish I could comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern

B., 199; 18 Q. B. 134, S. C.; Rackham *v.* Marriott, 1 H. & N. 234; 2 H. & N. 196, S. C. in Ex. Ch.

[1] Routledge *v.* Ramsay, 8 A. & E. 221; 3 N. & P. 319, S. C.

[2] Whippy *v.* Hillary, 3 B. & Ad. 399; 5 C. & P. 209, S. C. This case overrules Baillie *v.* Lord Inchiquin, 1 Esp. 435, as the Court admitted in Routledge *v.* Ramsay, 8 A. & E. 223, 224.

[3] Spong *v.* Wright, 9 M. & W. 629.

[4] Brigstocke *v.* Smith, 1 Cr. & Mee. 483; 2 Tyr. 445, S. C.; Coltman *v.* Marsh, 3 Taunt. 380.

[5] Tanner *v.* Smart, 6 B. & C. 603; 9 D. & R. 549, S. C.; Haydon *v.* Williams, 7 Bing. 167, per Tindal, C. J.; Ayton *v.* Bolt, 4 Bing. 105; Gould *v.* Shirley, 2 M. & P. 581.

[6] Hodgens *v.* Graham, 1 Alc. & Nap. 49.

[7] Edmunds *v.* Downes, 2 Cr. & Mee. 459; 4 Tyr. 173, S. C.

[8] Dodson *v.* Mackey, 8 A. & E. 225, n.; 4 N. & M. 327, S. C.

must be broken up to meet it;"[1]—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained I cannot move a step towards giving you satisfaction, and doing justice to my other creditors;"[2]—"Your bill does not sufficiently specify the work done, and I shall feel obliged if you will more particularly explain it. I will settle your amount immediately, but being at a distance, I want everything explicit. Tell H. to send me the agreements, and I will return them by the first post with instructions to pay, if correct;"[3]—"Your demand is not just; I am not in your debt anything like 90*l.*; I will settle the difference when we meet;"[4] —"I have received your letter" [which stated that some items in the bill sent with it were of more than six years' standing]; "P. will attend for me to tax your costs, and one will then know what to pay, the other what to receive;"[5]—"I send you my account, leaving a blank for your counter demand on me, and beg that you will favour me with the balance;"[6]—"I will at any time pay my proportion of the joint debt;"[7]—"I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for 30*l.*, the balance of your money."[8]

§ 992. In order to take a case out of the Statute of Limitations

[1] Bird *v.* Gammon, 3 Bing. N. C. 883; 5 Scott, 213, S. C.; Martin *v.* Geoghegan, 13 Ir. Law R. 403.

[2] Gardner *v.* M'Mahon, 3 Q. B. 561; 2 G. & Dav. 593, S. C. This case was questioned by Alderson, B., in Hart *v.* Prendergast, 14 M. & W. 746; See Bewley *v.* Power, Hayes & Jon., Ex. Ir., 368; Prance *v.* Sympson, 1 Kay, 678, cited ante, p. 879, n. 2.

[3] Sidwell *v.* Mason, 2 H. & N. 306.

[4] Colledge *v.* Horn, 3 Bing. 119; 10 Moore, 431, S. C.; Edmonds *v.* Goater, 15 Beav. 415.

[5] Murphy *v.* Meredith, 5 Ir. Law R. 120. Held, that this was not a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of costs.

[6] Waller *v.* Lacy, 1 M. & Gr. 54; 1 Scott, N. R. 186; 8 Dowl. 563, S. C.; Williams *v.* Griffith, 3 Ex. R. 335.

[7] Lechmere *v.* Fletcher, 1 Cr. & Mee. 623; 3 Tyr. 450, S. C.

[8] Dabbs *v.* Humphries, 10 Bing. 446. See also Evans *v.* Simon, 9 Ex. R. 282; Collis *v.* Stack, 1 H. & N. 605. The older authorities are not here referred to, as few of them are law. They will be found noticed in 2 St. Ev. 662—667, and in Roscoe, Ev. 318—321.

by a *part payment*, it is not necessary that at the time of the payment, the exact amount remaining due should be distinctly ascertained.[1] Still, it must appear that the payment was made, not only on account of *a* debt, but *on account of the debt* for which the action is brought; and therefore, if there be two undisputed but entirely separate debts, a part payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either.[2] Moreover, it must appear that the payment was made in *part* discharge of the debt declared on; for the meaning of *part payment* is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it.[3] The circumstances, too, must be such as to warrant the jury in inferring a promise to pay; and therefore, if part payment be accompanied by a positive refusal to pay the remainder, it will not take the case out of the statute, though the debtor admits that the remainder is due.[4] The reason why the effect of such payment is left untouched by Lord Tenterden's Act appears to be, that it is an admission evidenced by an *act*, and as such not so liable to misinterpretation or mistake as a *mere* acknowledgment by *words*.[5]

§ 993. It has been urged that, on the same ground, the sale and delivery of goods, which, equally with the payment of money, are acts done, should be exempted from the operation of Lord Tenterden's Act; but the answer is that, however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods. These acts, therefore, are not sufficient

[1] Walker *v.* Butler, 25 L. J., Q. B., 377; 6 E. & B. 506, S. C.
[2] Burn *v.* Boulton, 2 Com. B. 476. But see Walker *v.* Butler, 6 E. & B. 509—511. See also Nash *v.* Hodgson, cited post, § 994.
[3] Tippets *v.* Heane, 1 C. M. & R. 252; 4 Tyr. 772, S. C.; Waters *v.* Tompkins, 2 C. M. & R. 723; Tyr. & Gr. 137, S. C.; Waugh *v.* Cope, 6 M. & W. 824, 829. See Worthington *v.* Grimsditch, 7 Q. B. 479.
[4] Wainman *v.* Kynman, 1 Ex. R. 118. See ante, § 678.
[5] Waters *v.* Tompkins, 2 C. M. & R. 726, per Parke, B.; Bodger *v.* Arch, 10 Ex. R. 340, per id.

to take a case out of the Statute of Limitations, unless done under circumstances which would render the delivery equivalent to payment;[1] as, for instance, if the parties were expressly to agree that goods delivered by the one should be taken by the other in part payment of the debt.[2] In such a case the statute would be barred, for the Legislature never intended that the "part payment" should necessarily be in actual money, but it will suffice if it be made in any mode which the parties agree shall be treated as equivalent to a money payment.[3]

§ 994. Neither will the existence of *items* within six years in *an open account*, operate to take the previous portion of the account out of the Statute of Limitations, but there must be an actual part payment in cash, or something equivalent to it.[4] Moreover, if in a continuous account some items have accrued before, and others within, the six years, the mere payment of a sum by the debtor, without any evidence of an appropriation on his part, or of an intention to apply such sum in part discharge of the earlier items, will not have the effect of exempting them from the operation of the Statute of Limitations; though, in such case, the creditor may at any time apply the payment to the debts that have been due for a longer period than six years.[5] Where a party had been the maker of three promissory notes, two of which were barred by the Statute, but the other was not barred, a payment made by him on account of interest generally was attributed exclusively to the note which was not barred.[6] It has

[1] Cottam *v.* Partridge, 4 M. & Gr. 271, 287—289, 291—293; 4 Scott, N. R. 819, S. C.; overruling Catling *v.* Skoulding, 6 T. R. 189, as only applicable to the state of the law previous to the passing of Lord Tenterden's Act. See also Williams *v.* Griffiths, 2 C. M. & R. 46, 47, per Parke, B.

[2] Hart *v.* Nash, 2 C. M. & R. 337; Hooper *v.* Stephens, 4 A. & E. 71; 7 C. & P. 260, S. C.; Blair *v.* Ormond, 17 Q. B. 434, 435. See Hughes *v.* Paramore, 24 L. J., Ch., 681; 7 De Gex, M. & Gord. 229, S. C.

[3] Bodger *v.* Arch, 10 Ex. R. 333, 340, per Parke, B.

[4] Cottam *v.* Partridge, 4 M. & Gr. 271; 4 Scott, N. R. 819, S. C.; Williams *v.* Griffiths, 2 C. M. & R. 45; 5 Tyr. 748, S. C.; Mills *v.* Fowkes, 5 Bing. N. C. 455; 7 Scott, 444, S. C.; Waller *v.* Lacy, 1 M. & Gr. 54, 75; 1 Scott, N. R. 186, S. C.; Williams *v.* Griffith, 3 Ex. R. 335.

[5] Mills *v.* Fowkes, 5 Bing. N. C. 455; 7 Scott, 444, S. C.

[6] Nash *v.* Hodgson, 25 L. J., Ch., 186; 6 De Gex, M. & Gord. 474, S. C.; reversing decision of Wood, V. C., reported in 1 Kay, 650.

been held in one case, that the going through an account with items on both sides, and striking a balance, was an act equivalent to part payment; the apparent ground of the decision being, that such a proceeding converted the *set-off* into *payments*, and raised a new consideration for the liquidation of the balance.[1] Be this as it may, the doctrine will not extend to a case where an account has been merely furnished by one party, even though it contain cross items, and fix the balance due.[2] Neither will it apply where the account actually stated and settled by both parties contains items on one side only,[3] for it will then be no more than a mere parol statement of, and promise to pay, an existing debt; and to hold such a statement of account to be sufficient, would be to repeal the statute.[4]

§ 995. Though the payment, in order to take the case out of the operation of the statute, may be either of principal or of interest, yet if the debt be made up of sums due on both these accounts, the payment of the principal will raise no implied promise to pay the interest, at least, if accompanied by a refusal to pay it;[5] but the payment of interest barred by the statute, though it does not necessarily prove that the principal money is due, is some evidence of that fact;[6] and if coupled with other circumstances, as, for instance, if the interest was due upon a note, which was allowed to remain in the hands of the payee, the payment of that interest might fairly be regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal.[7] Where a bill is drawn in part payment of a debt, it operates to defeat the statute from the time of its delivery to the creditor,[8] and this, too, whether the bill be subsequently

[1] Ashby *v.* James, 11 M. & W. 542.
[2] Bristow *v.* Miller, 11 Ir. Law R. 461, 472.
[3] Ashby *v.* James, 11 M. & W. 543, 544, per Alderson, B., apparently overruling Smith *v.* Forty, 4 C. & P. 126, per Vaughan, B.
[4] Jones *v.* Ryder, 4 M. & W. 32; Reeves *v.* Hearne, 1 M. & W. 323; Hopkins *v.* Logan, 5 M. & W. 248, per Parke and Alderson, Bs.; Clark *v.* Alexander, 8 Scott, N. R. 147.
[5] Collyer *v.* Willock, 4 Bing. 313.
[6] Purdon *v.* Purdon, 10 M. & W. 562.
[7] Bealy *v.* Greenslade, 2 Cr. & Jer. 61; Bamfield *v.* Tupper, 7 Ex R. 27.
[8] Turney *v.* Dodwell, 3 E. & B. 136; Irving *v.* Veitch, 3 M. & W. 90; Gowan *v.* Foster, 3 B. & Ad. 507.

honoured or not; for the word "payment" in Lord Tenterden's Act must be taken to be used by the Legislature in a popular sense, and in a sense large enough to include not only payments in actual satisfaction, but also conditional payments.

§ 996. With respect to the mode of proving the *fact* of payment, the Courts for many years put a forced, though salutary construction on Lord Tenterden's Act, and held that that fact could not be established by *any admission* of the debtor short of an acknowledgment in writing duly signed.[1] This doctrine, however, has recently been rejected by the Exchequer Chamber as untenable, and it is now settled law that a mere parol acknowledgment, either of part payment of principal, or of payment of interest, within six years will suffice to take the case out of the Statute of Limitations.[2] It seems almost needless to add that when the fact of some payment having been made has once been proved, recourse can be had to the parol admissions of the debtor, whether made before, or after, or at the time of payment, for the purpose of showing on what account that payment was made.[3] Though reasonable evidence must be given of the identity of the debt, on account of which payment was made, with that which forms the subject-matter of the action,[4] the jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due.[5]

§ 997. § 5 of the same statute enacts, that "no action shall be maintained, whereby to charge any person upon any *promise made after full age to pay any debt contracted during infancy,*

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[1] Bayley *v.* Ashton, 12 A. & E. 493; 4 P. & D. 204, S. C.; Willis *v.* Newham, 3 Y. & Jer. 518; Maghee *v.* O'Neil, 7 M. & W. 531; Eastwood *v.* Saville, 9 M. & W. 615.

[2] Cleave *v.* Jones, 6 Ex. R. 573. See also Edwards *v.* Janes, 1 Kay & J. 534.

[3] Waters *v.* Tompkins, 2 C. M. & R. 723; Tyr. & Gr. 137, S. C.; Bevan *v.* Gething, 3 Q. B. 740; 3 G. & D. 59, S. C.; Edan *v.* Dudfield, 1 Q. B. 307, 308, per Lord Denman. See Baildon *v.* Walton, 1 Ex. R. 617. [4] Waters *v.* Tompkins, 2 C. M. & R. 727, per Parke, B.

[5] Evans *v.* Davies, 4 A. & E. 840; 3 N. & P. 464, S. C.; Burn *v.* Boulton, 2 Com. B. 476. As to the law, where payment is made by one of several joint debtors, see ante, §§ 675—677.

or upon any ratification after full age of any promise or simple contract made during infancy, unless such *promise* or *ratification* shall be made by *some writing signed* by *the party to be charged* therewith." The ratification under this section is something distinct from a new promise; and, according to the Court of Exchequer, "any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification."[1] Like the acknowledgment under the first section of the Act, it will be valid, though it contains no date, and does not specify the amount of the debt or the creditor's name; for all these points may be established by oral testimony.[2] An account stated by an infant may, equally with any other contract he may have entered into, be ratified by him after he attains his full age;[3] but the ratification must, in all cases, be made before the commencement of the suit on the original contract.[4]

§ 998. § 6 enacts, that "no action shall be brought, whereby to charge any person upon, or by reason of, any *representation* or assurance made or given concerning or *relating to* the character, conduct, *credit*, ability, trade, or dealings *of any other person*, to the intent or purpose that such other person may obtain credit, money, or goods upon,[5] unless such *representation* or *assurance* be made in *writing*, *signed* by the *party to be charged* therewith." This provision,—which is now in substance extended

[1] Harris *v.* Wall, 1 Ex. R. 130. In Mawson *v.* Blane, 10 Ex. R. 212, Martin, B., questions the above definition, and observes, "I apprehend a ratification to be a consent by a person after he becomes of full age, to be liable for a debt contracted during infancy, expressing to the effect, that he is willing to affirm it, and treat it as valid."

[2] Hartley *v.* Wharton, 11 A. & E. 934; 3 P. & D. 529, S. C.; Harris *v.* Wall, 1 Ex. R. 122; ante, § 988. See Mawson *v.* Blane, 10 Ex. R. 206. As so the burthen of proof, see ante, § 343.

[3] Williams *v.* Moor, 11 M. & W. 256; overruling a distinction taken by Bayley, J., in Thornton *v.* Illingworth, 2 B. & C. 826. See ante p. 880, n. 5.

[4] Thornton *v.* Illingworth, 2 B. & C. 824; 4 D. & R. 545, S. C. See Bateman *v.* Pinder, 3 Q. B. 574, cited ante, § 988.

[5] The word "upon" is obviously a misprint.

to Scotland by the Act of 19 & 20 Vict., c. 60, s. 6,—was rendered necessary by the case of Pasley *v.* Freeman,[1] which afforded ample opportunity for evading the enactment of the Statute of Frauds, requiring that guarantees should be in writing,[2] by enabling the plaintiff to shape his demand, not upon a *special promise* to answer for the debt or default of another, but upon a *tort* or wrong done to him, by some false or fraudulent representation made by the defendant, in order to induce him to contract with another person.

§ 999. The meaning of the word "ability," mentioned in the section, has been the subject of more than one lengthened discussion in the courts of law. In Lyde *v.* Barnard,[3] an action was brought against the trustee of Lord Edward Thynne, for falsely representing that Lord Edward's life interest in certain trust property was charged with only three annuities, whereby the plaintiff was induced to purchase an annuity from Lord Edward, secured by his bond, &c., and by an assignment of his interest in the trust fund; whereas, the defendant well knew that the said interest was also charged with a mortgage of 20,000*l.* It appearing at the trial that the representations were by parol, the judges of the Court of Exchequer were equally divided on the question, whether they related to the ability of Lord Edward; Barons Parke and Alderson contending that they simply had reference to the state of the fund; but Lord Abinger and Baron Gurney, with apparently more reason, holding, that they related to the state of the fund, as an element only of Lord Edward's personal credit, and that substantially the question which they purported to answer, regarded his ability to give security of adequate value. This last opinion is somewhat confirmed by a subsequent decision of the Court of Queen's Bench.[4] There, a false representation by an attorney, that his client might be safely trusted, because he had lately purchased an estate, and the title-deeds were in his (the attorney's) possession, so that the client could do nothing without his knowledge, was held by the

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[1] 3 T. R. 51. [2] Ante, §§ 931, 941—944.

[3] 1 M. & W. 101; Tyr. & Gr. 250, S. C. See 1 Smith, Lead. Ca. 79—81.

[4] Swann *v.* Phillips, 8 A. & E. 457; 3 N. & P. 447, S. C.

judges to be a representation respecting the ability of the client, which, consequently, required to be in writing.

§ 1000. In order to come within the meaning of the Act, it is not necessary that the action should be brought directly upon the representation; but where a plaintiff sought, in an action for money had and received, to recover the value of goods which he had supplied to a third party on the defendant's representation, and which had been sold by such third party, and the proceeds paid to the defendant, the Court held that, as the plaintiff's case rested on the misrepresentation alone, it directly fell within the terms of the Act.[1] Perhaps, had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might have been different.[2] The Act also applies to a misrepresentation made by one partner respecting the credit of the firm.[3] Where several false representations respecting a man's character have been made by different persons, or when the same person has made one representation in writing and another in conversation, the action will be maintainable, if the jury are of opinion that the plaintiff was mainly or even partially induced by the writing declared on to give the credit which occasioned the loss.[4]

§ 1001. To take a case out of the *Real Property Limitation Act*,[5] the several acknowledgments mentioned therein must all be in writing and duly signed. Thus, under § 14, "an acknowledgment of the title of the person entitled to any land or rent," must, in order to neutralise the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent, be "given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in receipt of such rent." So, under § 28, "an acknowledgment of the title of the mortgagor, or of his right of redemption,"

[1] Haslock v. Fergusson, 7 A. & E. 86; 2 N. & P. 269, S. C. [2] Id.
[3] Devaux v. Steinkeller, 6 Bing. N. C. 84; 8 Scott, 202, S. C.
[4] Wade v. Tatton, 25 L. J., C. P., 240.
[5] 3 & 4 Will. 4, c. 27; extended to Ireland by 6 & 7 Vict., c. 54, and 7 & 8 Vict., c. 27. See ante, p. 83, n. 4.

must, in order to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be "given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him."[1] § 40 also enacts, that "no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon, or payable out of any land[2] or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for, or release of, the same; unless in the meantime[3] some part of the principal money, or some interest thereon, shall have been paid, or some *acknowledgment* of the right thereto shall have been given in *writing signed by the person by whom the same shall be payable*,[4] *or his agent*, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

§ 1002. The acknowledgments of title mentioned in this Act should be distinct and unconditional; and, therefore, where a party in adverse possession of land, on being applied to by the person claiming title to it, to pay rent and take a lease, wrote in answer;—" Although, if matters were contested, I think I could establish a legal right to the premises, yet, under all the circumstances, I will accede to your proposal of my paying a

[1] As to what is a sufficient acknowledgment to satisfy these words, see Stansfield v. Hobson, 16 Beav. 236; 3 De Gex, M. & Gord, 620, S. C.; Trulock v. Robey, 12 Sim. 402.

[2] Money due on a bond executed by an ancestor is not a sum "charged upon, or payable out of, any land," within the meaning of this section; Roddam v. Morley, 1 De Gex & J. 1: 26 L. J., Ch., 438, S. C.; 25 L. J., Ch., 329, S. C., cor. Wood, V. C.; Morley v. Morley, 25 L. J., Ch., 1; 5 De Gex, M. & Gord. 610, S. C.

[3] As to the meaning of these words, see Harty v. Davis, 13 Ir. Law R. 23.

[4] As to the meaning of these words, see Toft v. Stephenson, 1 De Gex, M. & Gord. 28, 40.

moderate rent, on an agreement for a term of twenty-one years;" —it was held, that, as this arrangement was never carried into effect, the letter written with a view to it could not be regarded as an acknowledgment of title, within the meaning of § 14 of the Act.[1]

§ 1003. Again, the Act passed in 1833 for the Amendment of the Law,[2] after enacting that all actions of debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognizance, must be brought within twenty years after the cause of such actions or suits,[3] provides, that "if any acknowledgment shall have been made, either by *writing signed* by the *party liable* by virtue of such indenture, specialty, or recognizance, or *his agent*, or by part payment or part satisfaction, on account of any principal or interest being then due thereon," the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment.[4]

§ 1004. With respect to acknowledgments by signed writings under this Act, it seems to be clear, that the amount need not be specified in them any more than in acknowledgments under Lord Tenterden's Act; but if *anything* be due, the amount may be proved by parol evidence.[5] The acknowledgment, however, must contain an admission of an actually existing debt, and if it merely show that a debt was due at some prior time, it will not suffice. Whether an acknowledgment made to a third party will satisfy the Act is still a moot point;[7] but where a mortgagor, in assigning his equity of redemption, had recited that all interest was paid upon the mortgage, the Court held, in an action brought by the mortgagee against the mortgagor on the original mortgage deed,

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[1] Doe v. Edmonds 6 M. & W. 295. See Doe v. Beckett, 4 Q. B. 601, and cases cited in four preceding notes. [2] 3 & 4 Will. 4, c. 42.

[3] § 3, set out, ante, p. 85, n. 1. The Irish Act, 16 & 17 Vict., c. 113, contains a somewhat similar provision, in § 20.

[4] § 5; and 16 & 17 Vict., c. 113, § 23, Ir.

[5] Howcutt v. Bonser, 3 Ex. R. 496, per Parke, B.; see ante, § 988.

[6] Id. 491.

[7] Id. 491, 499, 500; Forsyth v. Bristowe, 8 Ex. R. 716. See ante, § 988.

within twenty years from the date of the assignment, that such recital was ample evidence of an acknowledgment by part payment of interest, so as to take the case out of the statute.[1] The assignee, too, in this case, having in pursuance of a covenant contained in the deed of assignment paid the future interest to the mortgagee, such payment was considered by the judges to be a sufficient acknowledgment as against the mortgagor.[2]

§ 1005. By the *Prescription Acts*, claims to rights of common and other profits à prendre, to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after the lapse of certain defined periods, unless it shall appear that the respective privileges were enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing."[3]

§ 1005 A. A proviso is contained in § 7 of the Railway and Canal Traffic Act of 1854,[4] to the effect that no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable, and be signed by such party, or by the person delivering such things for carriage.[5]

§ 1005 B. Under the Mercantile Law Amendment Acts of 1856, which were respectively passed for Scotland,[6] and for England and Ireland,[7] "no acceptance of any bill of exchange made after that year, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part

[1] Forsyth *v.* Bristowe, 8 Ex. R. 716. [2] Id.

[3] 2 & 3 Will. 4, c. 71, §§ 1, 2, 3, cited ante, p. 84, n. 3; 2 & 3 Will. 4, c. 100, § 1. See ante, p. 84, n. 1. [4] 17 & 18 Vict., c. 31.

[5] See Wise *v.* Great West. Rail. Co., 25 L. J., Ex., 258; 1 H. & N. 63, S. C.; Simons *v.* Great West. Rail. Co., 18 Com. B. 805; 2 Com. B., N. S., 620; London & North West. Rail. Co. *v.* Dunham, id. 826; Pardington *v.* South Wales Rail. Co., 1 H. & N. 392.

[6] 19 & 20 Vict., c. 60, § 11.

[7] 19 & 20 Vict., c. 97, § 6.

of such bill, on one of the said parts, and signed by the acceptor, or some person duly authorised by him."

§ 1006. The Merchant Shipping Act of 1854, among other protections which it affords to merchant seamen, enacts, that the master of every ship, except ships of less than eighty tons exclusively employed in the coasting trade, shall enter into an agreement with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, which agreement must be in a form sanctioned by the Board of Trade,—must be dated at the time of the first signature being attached to it,—must contain a variety of particulars specified in the Act,—and must be signed first by the master and afterwards by the seaman; and the signature of the seaman must be duly attested in the case of a foreign-going ship by a shipping-master, and in the case of a home-trade ship, either by a shipping-master or by some other witness; and in either event, before the seaman executes the instrument it must be read over and explained to him, or at least the witness must ascertain that he understands its meaning.[1] The same statute also enacts, in § 142, that "in the case of every boy bound apprentice to the sea service by any guardians or overseers of the poor, or other persons having the authority of guardians of the poor, the indentures shall be executed by the boy and the person to whom he is bound in the presence of, and shall be attested by, two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

§ 1007. Again, under the Acts for regulating Hackney and Stage Carriages within the Metropolitan Police Districts of London and Dublin, no proprietor of such carriages can enforce

[1] 17 & 18 Vict., c. 104, §§ 149, 150, 155. As to how the agreement is to be attested if the seaman is engaged in a Colonial or foreign port, see §§ 159, 160. As to what attestation is necessary when the agreement is altered by the consent of all parties, see § 163. As to how releases between master and seamen are to be attested and proved, see § 175.

the payment of any sum, claimed from any driver or conductor on account of his earnings, unless under an agreement in writing, which shall have been signed by such driver or conductor in the presence of a competent witness.[1]

§ 1007 A. Prior to the year 1855, several of the Acts relating to lunatics[2] required that certain orders and other instruments, which emanated from visitors and justices, should be under their respective *hands* and *seals;* but as these minute regulations were found to be practically inconvenient, a clause was inserted in the Act of 18 & 19 Vict., c. 105,[3] which dispensed with the necessity of employing any seal in future, and which even went so far as to provide, that all documents, which under the statutes in question had already been duly signed by a visitor or a justice, should be deemed valid, though no seal had been attached to them.

§ 1008. By the Act which governs the registration of persons entitled to vote in the election of members of Parliament, all notices of objection to persons, remaining on the list of voters, must be individually signed at the foot of the notice by the person objecting;[4] and if the notice is sent by the post, and the service of it is sought to be established by the production of a duplicate stamped at the Post-office, this duplicate must be personally subscribed, and externally directed, in the same manner as the copy sent.[5] So, under the same Act, notices of intention to prosecute an appeal, whether transmitted to the master of the Court of Common Pleas, or sent to the respondent, must be signed by the appellant himself.[6] Again, all notices of appeal to any Court

[1] 6 & 7 Vict., c. 86, § 23; 16 & 17 Vict., c. 112, § 36, Ir. Under the London Act the agreement requires no stamp, § 23.

[2] 8 & 9 Vict., c. 100; 16 & 17 Vict., cc. 96 & 97. [3] § 15.

[4] 6 & 7 Vict., c. 18, § 7, and Sched. A. No. 4 & 5, as to counties; § 17, Sched. B. No. 10 & 11, as to cities and boroughs; Toms *v.* Cuming, 7 M. & Gr. 88; Pruen *v.* Cox, 2 Com. B. 1. As to the Irish law, see 13 & 14 Vict., c. 69, §§ 26 & 36.

[5] 6 & 7 Vict., c. 18, § 100; Toms *v.* Cuming, 7 M. & Gr. 88; 8 Scott, N. R. 910, S. C.; Birch *v.* Edwards, 5 Com. B. 45. See Barclay *v.* Parrott, 1 Com. B., N. S., 49. See also 13 & 14 Vict., c. 69, § 113, as to the Irish law.

[6] 6 & 7 Vict., c. 18, § 62; Petherbridge *v.* Ash, 4 Com. B. 74. See

of general or quarter sessions, other than those against summary convictions, orders of removal, orders under any statute relating to pauper lunatics, orders in bastardy, or any proceedings by virtue of any Act relating to the revenue, must specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his attorney on his behalf.[1]

§ 1009. Under the Poor-law Amendment Acts, no pauper can be removed from one parish to another, unless by written consent, until twenty-one days after notice of chargeability *in writing*, accompanied by a copy or counterpart of the order of removal, and by a statement of the grounds of removal under the hands of *the overseers or guardians of the parish* obtaining such order, or any *three or more of such guardians*, shall have been sent by them through the post or otherwise to the overseers of the parish to whom such order shall be directed;[2] and no appeal can be heard against such order, unless the *overseers* or *guardians* of the appellant parish, or any three or more of such *guardians*, shall, with a notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, have sent or delivered to the overseers of the respondent parish *a statement in writing under their hands* of the grounds of appeal.[3] The notice of appeal, as also the statement of grounds of appeal, may be transmitted through the post;[4] and the fourteen days will be calculated from the time when, according to the usual course of post, the notice ought to reach the respondents.[5] In construing these provisions, the Court of Queen's Bench has held that although notices of appeal may be signed by the attorney on behalf of the appellant parish,[6] notices of chargeability, and statements of grounds of removal and of appeal must respectively bear the signatures of the overseers or guardians.[7] They will,

Rawlins *v.* West Derby, 2 Com. B. 72. As to the Irish law, see 13 & 14 Vict., c. 69, § 75.

[1] 12 & 13 Vict., c. 45, §§ 1 & 2.

[2] 4 & 5 Will. 4, c. 76, § 79; 11 & 12 Vict., c. 31, §§ 2, 9.

[3] 4 & 5 Will. 4, c. 76, § 81.

[4] 14 & 15 Vict., c. 105, § 10.

[5] R. *v.* Slawstone, 18 Q. B. 388.

[6] R. *v.* Middlesex, 1 L. M. & P. 621; R. *v.* Carew, id. 626, n.

[7] R. *v.* Derby, 1 L. M. & P. 660, per Patteson, J.; R. *v.* Middlesex, id. 625, per id.; R. *v.* Worcester, 5 Q. B. 508, n.; R. *v.* Surrey, id. 506.

however, be valid, if signed by a majority of the aggregate body of the overseers and churchwardens;[1] though they must be signed by at least such a majority.[2] Still it is not necessary that the document should show on its face that it proceeds from a majority of the parish officers,[3] but it is certainly very desirable that this fact should appear.[4] The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed to act for particular parishes under § 39 of 4 & 5 Will. 4, c. 76.[5] As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is precluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face.[6]

§ 1009 A. The Metropolis Local Management Act[7] enacts, in § 222, that "every notice, demand, or like document given by or on behalf of the Metropolitan Board of Works, or any vestry or district Board under that Act, may be in writing or print, or partly in writing and partly in print, and shall be sufficiently authenticated if signed by their clerk, or by the officer by whom the same is given." Similar provisions are contained in § 55 of the Joint-Stock Companies Act, 1856,[8] which enacts, that "any summons, notice, writ, or proceeding requiring authentication by the Company, may be signed by any director, secretary, or other authorised officer of the Company, and need not be under the common seal of the Company, and the same may be in writing or in print, or partly in writing and partly in print."

§ 1010. With respect to warrants and other instruments issuing from the *Treasury*, these may now in all cases be issued under the hands of any *two* or more of the commissioners;[9] and a

[1] R. *v.* Warwickshire, 6 A. & E. 873; 2 N. & P. 153, S. C.; R. *v.* Derbyshire, 6 A. & E. 885.
[2] R. *v.* Westbury, 5 Q. B. 500.
[3] R. *v.* Colerne, 11 Q. B. 909.
[4] R. *v.* Westbury, 5 Q. B. 504, 505.
[5] R. *v.* Surrey, 5 Q. B. 506; R. *v.* Lambeth, and R. *v.* Southampton, id. 513.
[6] R. *v.* Leominster, 5 Q. B. 640, 652.
[7] 18 & 19 Vict., c. 120.
[8] 19 & 20 Vict., c. 47.
[9] 12 & 13 Vict., c. 89, enacts, that, "where any warrant, appointment, authority, approval, instrument, or act whatsoever is by any Act of Par.

like convenient rule has also been adopted in reference to all orders and other documents emanating from the Commissioners of Customs.[1]

§ 1011. In considering how and when the signatures rendered necessary by these several Acts may be affixed *by procuration*, attention must be paid to the language employed by the Legislature in each particular case. In some cases, as for instance in those which fall within the 7th section of the Statute of Frauds,[2]—the third part of the Merchant Shipping Act, 1854,[3]—the 7th, 17th, and 62nd sections of the Voters' Registration Act,[4]—the 23rd section of the English Act, and the 36th section of the Irish Act, for Regulating Metropolitan Public Carriages,[5]—the 5th, and 6th sections of Lord Tenterden's Act,[6]—the 2nd and 4th sections of the respective Sculpture Copyright Acts,[7]—and the 14th and 28th sections of the Real Property Limitation Act,[8] it seems to be

liament or otherwise required to be issued, made, signified, or done by or under the hands of the said Commissioners, or by or under the hands of any three or more of them, every such warrant, appointment, authority, approval, instrument, or act may be issued, made, signified, or done by or under the hands of any two or more of the said Commissioners, and when so issued, made, signified, or done as aforesaid, shall be binding and have the same effect, to all intents and purposes, as if issued, made, signified, or done by or under the hands of the said Commissioners, or by or under the hands of any three or more of them, as the case may require."

[1] 16 & 17 Vict., c. 107, § 8, enacts, that "every order, document, or instrument required by law to be under the hands of the Commissioners of Customs, but not required to be signed by two or more of them, being attested by the signature of any one of such Commissioners,—and every order, document, or instrument required by any law to be under the hands, or under the hands and seals, of the Commissioners of Customs, being attested by the hands, or the hands and seals, of two or more of such Commissioners,—shall be deemed to be an order, document, or instrument under the hands, or under the hands and seals, as the case may be, of the Commissioners of Customs."

[2] Ante, § 929. [3] Ante, § 1006. [4] Ante, § 1008. [5] Ante, § 1007.

[6] Ante, §§ 997, 998; Hyde v. Johnson, 2 Bing. N. C. 776; 3 Scott, 289, S. C.; Gibson v. Baghott, 5 C. & P. 211, per Parke, B.

[7] 38 Geo. 3, c. 71, § 2; 54 Geo. 3, c. 56, § 4.

[8] Ante, § 1001. See Corp. of Dublin v. Judge, 11 Ir. Law R. 8, where held, that an acknowledgment of title signed by a third party for and in the presence of the person in possession, who was too ill to write, was sufficient o satisfy the Act.

clear that the *signature of an agent*, however appointed, *will not suffice*. In other cases, though the paper may be signed by an agent, yet his *authority* to do so must be *evidenced in writing*. For instance, this is expressly required in the 1st and 3rd sections of the Statute of Frauds.[1] In other cases again, the Legislature, while it allows agents to sign the documents, *does not require them to act under any written authority*. Thus, in cases falling within the 4th or 17th sections of the Statute of Frauds,[2]—the 1st section of Lord Tenterden's Act, and the 24th section of the corresponding Irish Act, 16 & 17 Vict. c. 113, as respectively amended by § 13 of the Mercantile Marine Act of 1856,[3]—the 40th section of the Real Property Limitation Act,[4]—the 5th section of the Act of 1833 for the Amendment of the Law,[5]—the 2nd section of the Dramatic Copyright Act,[6]—and the 1st section of Mr. Baines's Act,[7] an agent authorised merely by parol, may sign the respective documents on behalf of his principal; and even though the agent has acted in the first instance without any authority whatever, yet, if the principal by subsequent conduct has recognised and adopted what he has done, this will be sufficient to satisfy the respective statutes.[8]

§ 1012. The practical effect of these rules, which rest on no principle, but are the result of arbitrary, if not of accidental, legislation, is in some instances sufficiently absurd. Thus, while no action can be brought against a man for falsely representing his friend to be a person of substance, unless such representation be in writing signed by himself, any person may be sued on an ordinary guarantee to be answerable for another's debt, if the promise to pay be given in writing by his authorised agent; that is, the latter person, unlike the former, is exposed to be charged by the verbal statement of the party actually signing the promise, that he had authority so to sign.[9] So, also, while an agent cannot bind

[1] Ante, §§ 915, 917. [2] Ante, §§ 931, 932.
[3] Ante, § 987. [4] Ante, § 1001. [5] Ante, § 1003.
[6] 3 & 4 Will. 4, c. 15; Morton v. Copeland, 16 Com. B. 517.
[7] 12 & 13 Vict., c. 45; ante, § 1008.
[8] Maclean v. Dunn, 4 Bing. 722; 1 M. & P. 761, S. C.; Gosbell v. Archer, 2 A. & E. 500, 507; Fitzmaurice v. Bayley, 26 L. J., Q. B., 114; 6 E. & B. 868, S. C.
[9] Lyde v. Barnard, 1 M. & W. 104, per Gurney, B.

his principal by surrendering a lease not exceeding the term of three years, unless he be duly authorised in writing, he may, under a mere oral authority, enter into a contract for the sale of lands; or for the sale of merchandise above the value of ten pounds.[1] It may here be added that an *auctioneer* is regarded, at the time of the auction,[2] as the agent of both vendor and purchaser, whether the subject of the sale be lands or goods; and if the whole contract can be made out from the memoranda and entries signed by him, it is sufficient to bind them both.[3]

§ 1013. Besides the Acts noticed above, and many others of a like nature, which require certain transactions to be evidenced by writing, a cloud of statutes might be mentioned, which, in order to give validity to documents, render it necessary that they should be executed or attested in a particular form. It is not here intended to enumerate these statutes; but before leaving the subject it may be observed that registers of marriages, whether in this country,[4] or,—since the 1st January, 1852,—in India;[5] assignments of copyright, and consents of the proprietors of books to their sale by a stranger,[6] if respectively granted before the 1st of July, 1842;[7] similar assignments and consents under the Sculpture Copyright Acts;[8] assignments of bail bonds;[9] the protest by any person other than a notary public, of an inland bill of exchange of the valve of 20*l.* and upwards, whether such protest be for non-acceptance or non-payment;[10] the deed

[1] Ante, §§ 917, 931, 932; 1 Sug. V. & P. 186. See 7 M. & W. 343.

[2] But at that time only, Mews *v.* Carr, 1 H. & N. 484.

[3] Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 290; Kenworthy *v.* Schofield, 2 B. & C. 945; 4 D. & R. 556, S. C.; Wood *v.* Midgley, 2 Sm. & Gif. 115; 1 Sug. V. & P. 188—191.

[4] 6 & 7 Will. 4, c. 85, § 23; 6 & 7 Will. 4, c. 86, § 31; 12 & 13 Vict., c. 68, § 11.

[5] 14 & 15 Vict., c. 40, § 11.

[6] 8 Anne, c. 19, § 1; Davidson *v.* Bohn, 6 Com. B. 456; Jefferys *v.* Boosey, 4 H. of L. Cas. 994—996, per Lord St. Leonards.

[7] When the Act of 5 & 6 Vict., c. 45, came into operation.

[8] 38 Geo. 3, c. 71, § 2; 54 Geo. 3, c. 56, § 4.

[9] 4 Anne, c. 16, § 20.

[10] 9 & 10 Will. 3, c. 17, § 1; 3 & 4 Anne, c. 9, § 6. These protests are very unusual, and of little, if any, use. See Windle *v.* Andrews, 2 B. & A. 696; 2 Stark. R. 425, S. C.

of a father appointing a guardian of the personal estate of his child;[1] all deeds by which new trustees of property conveyed for religious or educational purposes may now be appointed;[2] conveyances to charitable uses under the Mortmain Act;[3] and both parts of the deed of bargain and sale enrolled, whereby the exchange of charity lands is effected,[4]—must respectively be attested by *two* or more credible witnesses; and *one* subscribing witness, at the least, must attest every signature and indorsement attached to any bill, note, undertaking, or draft, other than a cheque on a banker, which shall be issued for the payment of any sum amounting to 20*s.* and less than 5*l.*[5] Moreover, every lease made under "the leasing powers Act for religious worship in Ireland, 1855," must be "by indenture, sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness;" but, singularly enough, the statute does not require that such witness should attest the instrument by attaching his signature to it.[6]

§ 1014. By the Act of 1 & 2 Vict., c. 110, "no *warrant of attorney* to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some attorney of the superior courts on behalf of such person, *expressly named by him*, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and *thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.*"[7] And no warrant or cognovit executed in any other manner shall be "rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."[8]

[1] 12 Car. 2, c. 24, § 8. The guardian himself may be one of the witnesses, Morgan *v.* Hatchell, 24 L. J., Ch., 135, per Romilly, M. R.

[2] 13 & 14 Vict., c. 28, § 3. [3] 9 Geo. 2, c. 36, § 1.

[4] 1 & 2 Geo. 4, c. 92, § 4. [5] 17 Geo. 3, c. 30; 7 Geo. 4, c. 6.

[6] 18 & 19 Vict., c. 39, § 10, which enacts also, that "the counterpart of every such lease shall be executed by the lessee thereof." These words would seem to preclude an agent from executing the counterpart under a power of attorney from the lessee. [7] § 9. [8] § 10.

These provisions, which were passed into law by the Legislature, in order to secure to indigent and ignorant defendants due information of the nature and effect of the documents they are called upon to sign, and thus to protect them against the practices of hard designing plaintiffs, are so stringent in themselves, and have been so strictly interpreted by the Courts, that it behoves creditors, when seeking to obtain these securities, to take the greatest care that their debtors literally comply with the directions of the Act.[1]

§ 1015. First, the attesting witness must be an actual attorney,[2] though it is not necessary for him to have taken out his certificate.[3] Secondly, if the defendant introduces a person as an attorney, he will be estopped from afterwards denying his character, at least unless he can clearly show that he acted in ignorance.[4] Thirdly, the attorney attending on behalf of the defendant must be some person *other than* the attorney, or the attorney's agent, acting for the plaintiff;[5] and though the statute does not require that the plaintiff should employ an attorney, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single attorney being present, that he was acting *exclusively* on behalf of the defendant.[6] Fourthly, it is not necessary that the attorney should be *originally* or *spontaneously* named by the defendant, or that he should *come* to the place of meeting at his request; but if he *remains* there at the defendant's request, and is clearly and *expressly adopted* by him as his attorney, this will

[1] See Mr. Robinson's useful little book on the Law of Warrants of Attorney, 34—57.

[2] Paul *v.* Cleaver, 2 Taunt. 360.

[3] Holgate *v.* Slight, 2 L. M. & P. 662, per Erle, J., overruling Verge *v.* Dodd, Tidd's New Pract. 279, 280, as an authority since the New Attorney Act.

[4] Cox *v.* Cannon, 4 Bing. N. C. 453; 6 Dowl. 625, S. C.; Jeyes *v.* Booth, 1 B. & P. 97; Wallace *v.* Brockley, 5 Dowl. 695; Price *v.* Carter, 7 Q. B. 838, per Patteson, J.

[5] Mason *v.* Kiddle, 5 M. & W. 513; S. C. nom. Mason *v.* Riddle, 8 Dowl. 207; Rising *v.* Dolphin, 8 Dowl. 309; Pryor *v.* Swaine, 2 Dowl. & L. 37, per Coleridge, J.; Hirst *v.* Hannah, 17 Q. B. 383.

[6] Sanderson *v.* Westley, 6 M. & W. 98, 100, per Alderson, B.; 8 Dowl. 412, S. C.; Cooper *v.* Grant, 12 Com. B. 154; Hirst *v.* Hannah, 17 Q. B. 383.

suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser.[1] Still as an introduction from such a quarter will always be regarded with distrust, and may often, when taken in conjunction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his attorney to interfere in this manner;[2] and the imprudence of such a course will be more apparent when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his attorney, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it.[3]

§ 1016. Fifthly, the attorney is not bound to read over the instrument to his client unless desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived, if the client does not require it.[4] Sixthly, the subscription by the witness must be an *actual visible subscription*; and, therefore, where it became necessary, in consequence of an alteration having been introduced in a warrant of attorney, to re-execute the instrument, and the witness contented himself with retracing his previous attestation and signature with a dry pen, this was not deemed a sufficient compliance with the requisitions of the statute.[5] Seventhly, the law does not prevent the attorney to whom the warrant is addressed, and who is therefore entitled to enter up judgment upon it, from acting as attorney for the defendant to attest the execution.[6] Lastly, the memorandum of attestation must be drawn with great care, and in it the subscribing

[1] Walton *v.* Chandler, 1 Com. B. 306; 2 Dowl. & L. 802, S. C.; Taylor *v.* Nicholls, 6 M. & W. 91, 95; 8 Dowl. 242, S. C.; Bligh *v.* Brewer, 1 C. M. & R. 651; 5 Tyr. 222; 3 Dowl. 266, S. C.; Oliver *v.* Woodroffe, 4 M. & W. 650; 7 Dowl. 166, S. C.; Pease *v.* Wells, 8 Dowl. 626; Joel *v.* Dicker, 5 Dowl. & L. 1.

[2] Taylor *v.* Nicholls, 6 M. & W. 96, per Parke, B.

[3] Gripper *v.* Bristow, 6 M. & W. 807, 812; 8 Dowl. 797, S. C.; Barnes *v.* Pendrey, 7 Dowl. 747; Walker *v.* Gardner, 4 B. & Ad. 371.

[4] Taylor *v.* Nicholls, 6 M. & W. 95, per Parke, B.; 8 Dowl. 242, S. C.; Oliver *v.* Woodroffe, 4 M. & W. 651, per Parke, B.; 7 Dowl. 166, S. C.; Joel *v.* Dicker, 5 Dowl. & L. 1.

[5] Bailey *v.* Bellamy, 9 Dowl. 507. See ante, § 966.

[6] Levinson *v.* Syer, 21 L. J., Q. B., Bail C., 16.

witness must distinctly state two things; first, that he *is the attorney* of the party executing the instrument; and next, that *he subscribes as such.*

§ 1017. No precise form of words is rendered necessary by the Act, but those used must be such as to enable the Courts, either directly, or by necessary inference, to collect *both* the above facts.[1] Where, therefore, the attestation was as follows:—"Witness, A. B., defendant's attorney, named by him, and attending at his request;"[2]—or, "Signed by the above-named M., in the presence of us, of whom the said A. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to the said M. before the execution thereof by him. A. attorney. B.;"[3]—or, "Witnessed by me, W., as the attorney of the said N., attending at the execution hereof at his request, and expressly named by him. W. of Prescott, Lancashire;"[4]—the Courts held that the instruments were respectively invalid, as no one of the attestation clauses stated that the witness subscribed as the defendant's attorney. So, where the attestation was in the following form;—"Signed by A. in my presence, and I subscribe myself as attorney for the said A., expressly named by him to attest his execution of these presents;"—it was held, though with some doubt, to be insufficient, as containing no distinct declaration by the attesting witness of his being the attorney for the defendant.[5]

§ 1018. Where, however, the attestation was a follows:—"Signed, sealed, and delivered in the presence of E. F., attorney for the said C. C., and expressly named by him, and attending at his request. And I hereby subscribe myself to be the attorney

[1] Per Parke, B., in Hibbert *v.* Barton, 10 M. & W. 683, 684.

[2] Poole *v.* Hobbs, 8 Dowl. 116, per Coleridge, J., recognised and acted upon in 5 Q. B. 184. See also Potter *v.* Nicholson, 8 M. & W. 294; 9 Dowl. 808, S. C.

[3] Everard *v.* Poppleton, 5 Q. B. 181.

[4] Hibbert *v.* Barton, 10 M. & W. 678; 2 Dowl. N. S. 434, S. C. See also Pocock *v.* Pickering, 18 Q. B. 789.

[5] Elkington *v.* Holland, 9 M. & W. 659; 1 Dowl. N. S. 643, S. C.

for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him; and I hereby subscribe my name as a witness to the due execution thereof, E. F.;"[1] and in this form:—"Duly executed by the above-named R. G., in the presence of me, the undersigned S. B., attorney on behalf of the said R. G., expressly named by him, and attending at his request; and I do hereby declare that I subscribe my name as witness to the due execution hereof by the said R. G., and as his attorney, and that, previous to the execution hereof by the said R. G., I informed him of the nature and effect hereof. S. B., attorney, Birmingham;"[2] and in this form:—"Signed, sealed, and delivered by A. B., in my presence, and I declare myself to be attorney for the said A. B., and that I subscribe my name as such attorney. G. O., solicitor, Merthyr;"[3] it was held to be sufficient. So, where the witness after declaring himself to be the defendant's attorney, added, "and I subscribe myself *accordingly*, A. B," the directions of the Act were deemed to have been followed;[4] and, where the question was, whether the words "of me, M., the attorney of the said N." satisfied the statute, which required that the witness should "thereby declare himself to be the attorney for the person, &c.," it was held that they did, both in substance and in form.[5]

§ 1019. Notwithstanding the stringent and comprehensive language of the Act, it seems to be now settled, that where the person executing a warrant of attorney, or cognovit, is *himself an attorney*, he may dispense with the presence of another attorney on his behalf; for as attorneys are expressly selected to impart information to others respecting the nature of these instruments, they are presumed to require no advice on such a subject; and not being within the mischief of the statute, its provisions do not

[1] Lewis v. Lord Kensington, 2 Com. B. 463.
[2] Phillips v. Gibbs, 4 Dowl. & L. 275; 16 M. & W. 208, S. C.
[3] Gay v. Hall, 18 L. J., Q. B., Bail C., 12.
[4] Lindley v. Girdler, 1 Dowl. & L. 699, per Patteson, J.
[5] Knight v. Hasty, 12 Law J., Q. B., Bail C., 293; recognised in 5 Q. B. 183. See further, Ledgard v. Thompson, 11 M. & W. 40; 2 Dowl. N. S. 766, S. C.

apply to them.[1] But the Act extends to warrants of attorney executed abroad, if sought to be enforced in this country; for the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home.[2] The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate to personal actions. The result is, that, if a defendant in ejectment gives a warrant of attorney to confess judgment, no statutory execution is required;[3] but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act.[4]

§ 1020. As the above provisions were made exclusively for the benefit of defendants, third parties, even though prejudiced by warrants of attorney or cognovits having been given by such defendants to other creditors, cannot object to these instruments on the ground that no attorney attested their execution.[5] So, where judgment has been entered up on a warrant of attorney, executed by a principal and his sureties, and one of the sureties has paid the debt and recovered contribution from his co-surety, such co-surety cannot set aside the warrant, and compel the plaintiff to repay him the amount of contribution, on the ground of defective attestation.[6]

§ 1021. The above decisions which relate to the execution of warrants of attorney, and cognovits, would seem to be equally applicable to *satisfaction-pieces*, which may now be used in any of the common law courts, in lieu of a warrant of attorney to acknowledge satisfaction of a judgment, or a judge's fiat thereon; provided they be signed by the plaintiff, or his personal representative, and

[1] Chipp *v.* Harris, 5 M. & W. 430; Downes *v.* Garbutt, 2 Dowl. N. S. 939, per Coleridge, J.

[2] Davis *v.* Trevanion, 2 Dowl. & L. 743, per Wightman, J.

[3] Doe *v.* Kingston, 1 Dowl. N. S. 263, per Patteson, J.

[4] Doe *v.* Howell, 12 A. & E. 696.

[5] Chipp *v.* Harris, 5 M. & W. 430. See Pinches *v.* Harvey, 1 Q. B. 869.

[6] Price *v.* Carter, 7 Q. B. 838.

the signature be witnessed in like manner as in the case of warrants of attorney under 1 & 2 Vict., c. 110.[1]

§ 1022. In addition to warrants of attorney, cognovits, and satisfaction-pieces, several other documents may be mentioned, the validity of which depends upon their being duly attested by an attorney acting on behalf of the parties executing them. For instance, an admission of debt by a trader signed out of the Court of Bankruptcy, cannot be treated as an admission on which to found an adjudication of bankruptcy, unless it be made in a certain form, and in the presence of an attorney expressly named by the trader and attending at his request, to inform him of its effect before it be signed, and unless such attorney subscribes his name as a witness to the execution, and in such attestation declares himself to be attorney for the trader, and states therein that he subscribes as such attorney.[2] So, an admission by a witness in

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[1] Reg. Gen. H. T. 1853, rule 80; 1 E. & B. App. xvi. The form, as given in the rule, is as follows :—

"In the
Monday, the day of A.D. 185 .
to wit,—Satisfaction is acknowledged between Plaintiff and Defendant in an action for and : And do hereby expressly nominate and appoint , Attorney-at-Law, to witness and attest execution of this acknowledgment of satisfaction.

Judgment entered on the day of , in the year of our Lord, 185 . Roll No. .

Signed by the said in the presence of me of one of the attorneys of the Court of at Westminster. And I hereby declare myself to be attorney for and on behalf of the said expressly named by h and attending at h request to inform h of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h). And I also declare that I subscribe my name hereto as such attorney." } Signature. The above named plaintiff. Date.

[2] 12 & 13 Vict., c. 106, § 84. The form of admission as given in Sched. L to this Act, is as follows :—

"The Bankrupt Law Consolidation Act, 1849.
Admission of debt by Trader Debtor, signed out of Court.
I, the undersigned E. F. of do hereby confess, that I am indebted to A. B. of in the sum of (Signed) E. F.
Dated this day of A.D.
Witness,—G. H., attorney of the said E. F., and subscribing witness to

the Court of Bankruptcy that he is indebted to the bankrupt on a balance of accounts, will not justify the Court in ordering payment of the debt to the official assignee, unless it be reduced to writing, and signed by the witness after its effect has been explained to him by an attorney, either expressly named by himself, or named by the Court to act in his behalf; and unless such attorney signs his name as a witness to the admission in a certain statutory form.[1] By a rule, too, of the Insolvent Debtors' Court, every schedule and balance sheet, and every amendment thereto, filed by the prisoner must, before he signs it, be read over to him by, or in the presence of, the attorney named in the retainer, and such attorney must also attest the prisoner's signature, and verify the reading over, the signatures, and the attestation by affidavit.[2]

§ 1023. It may here be convenient to notice briefly a few of the principal statutes, which either require or permit the *enrolment* of particular instruments. And first as to the Acts which render enrolment *necessary*. One of the most important of these is the Mortmain Act,[3] which enacts, that all conveyances to charitable uses shall be void, unless, among other formalities,[4] they be enrolled in the Court of Chancery "within six calendar months next after the execution thereof." This enactment, however, does not apply to any conveyance or assurance of messuages, lands, or hereditaments to or in trust for the overseers of the poor, or the guardians of any parish or union, for the purpose of providing a

the execution hereof as such attorney." For the Irish law, see 20 & 21 Vict., c. 60, § 112, & Sched. K.

[1] 12 & 13 Vict., c. 106, § 123. The form as given in Sched. X to the Act, is as follows:—

"The Bankrupt Law Consolidation Act, 1849.

Admission of debt by Creditor of Bankrupt.

I, the undersigned J. K., of do hereby, in open Court, confess that I am indebted to E. F. of , a bankrupt, in the sum of , upon the balance of accounts between myself and the said E. F.

(Signed) J. K.

Witness,—G. H., attorney of one of the Superior Courts, and named by the said J. K. [*or* named by the Court here], according to the Bankrupt Law Consolidation Act, 1849."

[2] Rule XV., Oct. 1, 1838, cited in note *b* to 5 Com. B. 564.

[3] 9 Geo. 2, c. 36, §§ 1 & 3.

[4] See ante, § 1013.

workhouse or asylum for the accommodation of the poor.[1] The Act of 1 & 2 Geo. 4, c. 92, contains, in § 4, some special provisions for enrolling exchanges of lands that are subject to trusts for charitable purposes.

§ 1024. Under the old Act of 27 Hen. 8, c. 16, which was extended to the Counties Palatine by the statute 5 Eliz., c. 26, no estate of inheritance, or freehold in any lands, tenements or hereditaments, can pass by *bargain and sale*, unless such bargain and sale be by deed, enrolled within six months next after its date either in one of the Courts at Westminster, or in the county where the land lies, before the custos rotulorum, and two justices, and the Clerk of the Peace, or any two of them, the Clerk of the Peace being one. With the view of preventing frauds upon creditors by the secret transfer of personal property, every warrant of attorney to confess judgment in any personal action,[2] every cognovit actionem given by the defendant in any personal action,[3] every judge's order made by consent, and authorising the plaintiff in any personal action to sign judgment or issue execution against a trader defendant,[4] and every bill of sale of personal chattels,[5] is rendered void,—the first two instruments as against the assignees of the party giving them, in the event of his becoming bankrupt or insolvent; the third, as against the assignees of the trader defendant, if he becomes bankrupt,[6] but not as against himself;[7] and the last as against the assignees of the party giving the security, whether they be appointed under the laws relating to bankruptcy or insolvency, and also as against all sheriff's officers and other persons seizing his goods under process of law,

[1] 7 & 8 Vict., c. 101, § 73.

[2] 3 Geo. 4, c. 39, §§ 1 & 2; 6 & 7 Vict., c. 66; 12 & 13 Vict., c. 106, § 136; Acraman *v.* Herniman, 16 Q. B. 998; 7 & 8 Vict., c. 96, § 20 For the corresponding Irish enactments see 3 & 4 Vict., c. 105, § 12; 20 & 21 Vict., c. 60, § 334, Ir.

[3] 3 Geo. 4, c. 39, § 3; 6 & 7 Vict., c. 66; 12 & 13 Vict., c. 106, § 136; 7 & 8 Vict., c. 96, § 20. For the corresponding Irish enactments, see 3 & 4 Vict., c. 105, § 12; 20 & 21 Vict., c. 60, § 334, Ir.

[4] 12 & 13 Vict., c. 106, § 137; 20 & 21 Vict., c. 60, § 335, Ir.

[5] 17 & 18 Vict., c. 36, § 1. For a corresponding Irish enactment, see 17 & 18 Vict., c. 55, § 1.

[6] Farrow *v.* Mayes, 18 Q. B. 516.

[7] Bryan *v.* Child, 5 Ex. R. 368.

including execution creditors,—unless within twenty-one days after the security or the consent has been given, the warrant, cognovit, judge's order, or bill of sale, or a true copy thereof, be filed, together with an affidavit of the time when the instrument was executed or the consent was given, with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench.

§ 1025. All deeds and instruments, whereby any estates or hereditaments shall be purchased, sold, leased, charged, or exchanged under the authority of any Act relating to the possessions and land revenues of the Crown, must be enrolled, within six months after their several dates, in the office of Land Revenue Records and Enrolments.[1] Similar enactments are contained in the statutes which respectively relate to the possessions of the Duchy of Cornwall,[2] and to the possessions of her Majesty in respect of the Duchy of Lancaster;[3] but the instruments requiring enrolment under these Acts must be enrolled in the offices of the respective duchies.

§ 1026. The Act for the Abolition of Fines and Recoveries[4] enacts, in § 41, that no assurance, by which any disposition of lands shall be effected under that Act by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, shall have any operation by virtue of the Act, unless it be enrolled in the Court of Chancery within six calendar months after its execution; while § 46 provides, that the consent of a protector to the disposition of a tenant in tail shall, if given by a distinct deed, be void, unless the deed be enrolled in Chancery either at or before the time when the assurance by the tenant in tail shall be enrolled.[5]

§ 1027. The Act of 53 Geo. 3, c. 141,—which, though repealed

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[1] 10 Geo. 4, c. 50, § 63; 2 Will. 4, c. 1, § 21; 14 & 15 Vict., c. 42, § 6.
[2] 7 & 8 Vict., c. 65, §§ 30—36; 11 & 12 Vict., c. 83, § 6.
[3] 11 & 12 Vict., c. 83, § 14.
[4] 3 & 4 Will. 4, c. 74.
[5] See also §§ 49, 51, 52, & 59 of the Act, for further provisions respecting enrolment.

since the 10th of August, 1854, by Stat. 17 & 18 Vict., c. 90,[1] seems still to be in force with respect to transactions that have occurred *prior to that date*,—renders void, with certain exceptions,[2] every assurance, whereby any *annuity* or rent-charge has been granted for lives, or for any term of years or greater estate determinable on lives, unless within thirty days after its execution, a memorial of its date, and of the names of all the parties and witnesses to it, and of the persons on whose lives such annuity or rent-charge has been granted, and of the person by whom the same is to be beneficially received, and of the pecuniary consideration for granting it, and of the annual sum to be paid, has been enrolled in the Court of Chancery in a specified form.[3] The addresses of the witnesses need not have been inserted in the memorial, neither was it necessary to give their Christian names at full length; but it was sufficient if the names of the witnesses were stated, "as they appeared signed to their attestations," without any further description[4]. The exceptions specified in the Act included all annuities and rent-charges given by will or marriage settlement, or for the advancement of a child, or secured upon freehold or copyhold lands of at least equal value with the annuity, of which the grantor was seised in fee-simple or fee-tail in possession, or of which he was enabled to charge the fee-simple in possession, or secured by the actual transfer of stock of at least equal value with the annuity, or granted voluntarily without regard to pecuniary consideration or money's worth, or granted by any corporate body, or under any authority or trust created by Statute.[5]

§ 1028. As the object of the Annuity Acts was to protect necessitous persons from the extortionate arts of money-lenders,[6] and to check, by publicity, the mischievous practice of raising money by the sale of life annuities,[7] the Courts have considered

[1] § 2 provides that "nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this Act."

[2] 53 Geo. 3, c. 141, § 10.

[3] § 2.

[4] 3 Geo. 4, c. 92; 7 Geo. 4, c. 75; both repealed by 17 & 18 Vict., c. 90.

[5] 53 Geo. 3, c. 141, § 10.

[6] Evatt *v.* Hunt, 2 E. & B. 380, per Lord Campbell.

[7] Blake *v.* Attersoll, 2 B. & C. 879, per Bayley, J.

the enrolment clauses inapplicable to cases, where the transaction has not amounted to an actual sale of an annuity for cash, bills, or goods.[1] The consideration contemplated by the Legislature must have been either money, or something convertible into money.[2] Where the consideration was a pre-existing debt, no memorial was required to be enrolled.[3] Again, a deed did not require enrolment as a grant of an annuity, unless the alleged grantor was a party to it. Where, therefore, the grantee of an annuity released two-fifths of it by a deed, which was not executed by the grantor, no enrolment of this deed was held to be necessary.[4] The grantee of an annuity, who has omitted to enrol a memorial, cannot profit by his own default, and set up the want of registration against the grantor.[5]

§ 1028 A. The Annuity Act of Geo. 3 had no sooner been repealed[6] than the repeal was discovered to be an ill-advised step, as it prevented purchasers from ascertaining by search what life annuities or rent-charges had been granted by their vendors. It was found necessary therefore in 1855 to amend the amendment of 1854, and a clause was introduced in the Purchasers Protection Act,[7] which enacts in substance, that no annuity or rent-charge, otherwise than by marriage settlement, for life or lives, or for any term or estate determinable on life or lives, shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless a memorandum containing the name, residence, and description of the person whose estate is intended to be affected, and the date of the instrument, and the annual sum payable, be left for registration with the Senior Master of the Common Pleas.

§ 1029. Under the Act relating to attorneys and solicitors, the written contract between the articled clerk and the attorney or solicitor to whom he is bound, must be enrolled with one of the

[1] Blake v. Attersoll, 2 B. & C. 882, per Littledale, J.
[2] Id.; Evatt v. Hunt, 2 E. & B. 374.
[3] Doe v. Pontifex, 9 Com. B. 229; Marriage v. Marriage, 1 Com. B. 761.
[4] Humphreys v. Jenkinson, 8 Ex. R. 684.
[5] Molton v. Camroux, 2 Ex. R. 487, 495; ante, § 774.
[6] See ante, § 1027.
[7] 18 & 19 Vict., c. 15, § 12.

Masters of the Superior Courts, within six months after its date, together with an affidavit to be made by the attorney or solicitor, verifying the fact of the deponent having been duly admitted, and the further fact of the articles having been duly executed.[1] The Patent Law Amendment Act of 1852, contains also several provisions to enforce the filing of specifications, disclaimers, and memoranda of alterations, in the proper office of the Court of Chancery,[2] as also the enrolment in the Court of Chancery in Dublin, of transcripts of letters patent.[3]

§ 1030. The principal statutes which *permit* enrolments to be made, are—1st, the Act of 2 & 3 Anne, c. 4, which was amended by 5 Anne, c. 18, and which provides that a memorial of all deeds, conveyances, and wills concerning any houses, manors, lands, tenements, or hereditaments in the West Riding of Yorkshire, may, at the election of the parties concerned, be registered; 2nd, the Act of 6 Anne, c. 35, which contains similar provisions with respect to the East Riding; 3rd, the Act of 8 Geo. 2, c. 6, which applies to the North Riding; 4th, the Act of 7 Anne, c. 20, which was amended by 25 Geo. 2, c. 4, and which is applicable to Middlesex; 5th, the Charitable Trusts Act, 1855, which enacts, that any deed, will, or document relating to any charity may be enrolled in the office of the Charity Commissioners, and may be proved by copies certified under the hand of the secretary or one of the Commissioners;[4] and 6th, the Act of 3 & 4 Will. 4, c. 87, which,—after reciting that by divers Acts of Inclosure the awards of the Commissioners are required to be enrolled, but that such enrolments have in many instances been omitted,—goes on to enact, that the awards not enrolled shall still be valid, but that the parties interested may enrol them if they think proper.[5]

[1] 6 & 7 Vict., c. 73, §§ 8, 20.

[2] 15 & 16 Vict., c. 83, §§ 9, 27, 28, 34, 39.

[3] § 29.

[4] 18 & 19 Vict., c. 124, § 42, enacts, that "any deed, will, or document relating to any charity, may be enrolled by the Board in books to be provided and kept by them for that purpose at their office, and a copy of any such deed, will, or document made from such books, and certified under the hand of the secretary, or one of the Commissioners, shall be received as evidence of the contents of the same deed, will, or document."

[5] §§ 1 & 2.

CHAPTER XIX.

ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

§ 1031. PERHAPS the most difficult branch of the law of evidence is that which regulates the *admissibility of extrinsic parol testimony to affect written instruments.* In proceeding to discuss the rules of law connected with this subject, it will be well to advert to one or two established principles, which govern the interpretation of all writings. And first, in order to put a just construction upon the language of any document, the Court must *read the whole* of it, and must determine the meaning of the words employed in the passage under discussion, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument.[1] For it is obvious, that the language of a particular passage may be capable of bearing a wider or narrower signification, when read in connexion with other parts of the instrument where the same language is employed, than it would have borne, had no such reflected light been thrown upon it. For instance, suppose a question to arise respecting the meaning of the word "close" as used in a will. If this expression were only to occur once, evidence would be admissible to show, that, in the county where the property was situate, it denoted a farm; but if the word were found in other parts of the will, in any one of which this enlarged meaning could not be applied to it, such evidence would be clearly rejected, as the Court would then see that the testator had used the word in its ordinary sense, as denoting an enclosure.[2] So the word "month," which denotes at law a lunar month, may be shown by

[1] Blundell v. Gladstone, 11 Sim. 486; 1 Phill. 279, 283, 289, S. C.; Bateman v. Lord Roden, 1 Jones & Lat. 356, 368—370, per Sugden, C.

[2] Richardson v. Watson, 4 B. & Ad. 787, 799, per Parke, J.; 1 N. & M. 575, S. C.

the context to mean a calendar month, and the judge will in such case adopt that construction.[1] So, when words used in the operative part of a deed are of doubtful import, the recitals and other parts of the instrument will often furnish an excellent test for discovering the real intention of the parties, and will enable the Court to fix the true meaning of the language employed.[2]

§ 1032. Again, if the point at issue was whether a legacy, given by a codicil to a legatee under the will, was to be regarded as cumulative or substitutionary, the Court would certainly be justified in looking, not only to other parts of the same codicil, but to bequests in other later testamentary instruments; and if it should appear that, in these later codicils, the testator had used the words "in addition," when making bequests to other parties which were intended to be cumulative, the absence of these words, or of expressions of equivalent import, in regard to the legacy in question, would be a circumstance, though far short of conclusive, yet tending to show, in connexion with other facts and arguments, that the latter legacy was intended not to be additional, but in substitution. The Court, in such a case, would be bound to carry back and apply to the first codicil the knowledge it had acquired by examining the language of the later bequests.[3]

§ 1033.[4] If the instrument consists partly of a printed formula, and partly of written words, and any reasonable doubt is felt as to the meaning of the whole, the *written words* are entitled to have *greater effect* in the interpretation, than those which are printed;[5] they being the immediate language selected by the parties themselves for the expression of their meaning, while the *printed formula* is more general in its nature, applying equally to their case, and to that of all other contracting parties on similar subjects and occasions.[6]

[1] Lang v. Gale, 1 M. & Sel. 111; R. v. Chawton, 1 Q. B. 247. See ante, § 14.
[2] Walsh v. Trevanion, 15 Q. B. 733, 751.
[3] Lee v. Pain, 4 Hare, 218—221, 236, per Wigram, V. C.; Russell v. Dickson, 2 Dru. & War. 139, per Sugden, C.; Darley v. Martin, 13 Com. B. 684.
[4] Gr. Ev., § 278, almost verbatim.
[5] This rule is embodied in the New York Civ. Code, § 1695.
[6] Per Lord Ellenborough, in Robertson v. French, 4 East, 136.

§ 1034. Next, the terms of every document must, in the absence of all parol testimony, be construed in their *primary* sense, unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense.[1] But it may be said, what is the primary sense of a word? and this is a question which, in some cases, may be more easily asked than answered.[2] It may, however, be stated generally, that if the language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning;[3] but if, on the other hand, the expressions have reference to the common transactions of life, they will be interpreted according to their plain, ordinary, and popular meaning.[4]

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[1] Robertson *v.* French, 4 East, 135, 136, per Lord Ellenborough; Mallan *v.* May, 13 M. & W. 517, per Pollock, C. B.; Ford *v.* Ford, 6 Hare, 490, 491, per Wigram, V. C.; Hicks *v.* Sallitt, 23 L. J., Ch., 571, 578, per Wood, V. C.; Boorman *v.* Johnston, 12 Wend. 573.

[2] See Doe *v.* Perratt, 6 M. & Gr. 314, where the judges, in delivering their opinions before the House of Lords, differed widely upon the question, as to whether the word "heir," in a will, was to be construed in its technical or popular sense.

[3] Shore *v.* Wilson, 9 Cl. & Fin. 525, per Coleridge, J.; Doe *v.* Perratt, 6 M. & Gr. 342, per Parke, B.

[4] Robertson *v.* French, 4 East, 135, per Lord Ellenborough; Shore *v.* Wilson, 9 Cl. & Fin. 565, per Tindal, C. J. The rules for the interpretation of wills, laid down by Vice-Chancellor Wigram in his able treatise on that subject, may be safely applied, mutato nomine, to all other private instruments. They are contained in seven propositions, as the result both of principle and authority, and are thus expressed:—"I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will,

§ 1035. Bearing the above principles in mind, the first general rule which it will be necessary to notice, respecting the admissibility of extrinsic evidence to affect what is in writing, is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument.*[1] This rule of the common law, which may be traced back to a remote

from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the Court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the Court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of *intention*, to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i. e. *person* or *thing* intended) is described in terms, which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigram on Wills, pp. 11—14.

[1] Goss *v.* Lord Nugent, 5 B. & Ad. 64, 65; Wigram on Wills, 5; 2 Ph. Ev. 350. So, by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses." Tait Ev. 326, 327.

antiquity, is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls, "the uncertain testimony of slippery memory."[1] When parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong.[2]

§ 1036. Independent, too, of all considerations of convenience, the Legislature has, by positive enactment, adopted the same rule in several cases as an arbitrary and absolute one; and by requiring certain dispositions of property, and other transactions, to be evidenced by writing,—as, for instance, wills, contracts within the Statute of Frauds, and the like,[3]—has rigidly excluded all parol testimony tending to vary the terms contained in the written instrument.[4] But though the statutory rule will perhaps be more strictly enforced, than that which rests on the common law alone, because, in the former case, to relax the rule in any degree, is to the like extent to repeal the particular Act which renders the writing necessary;[5]—yet, at the present day, it

[1] Lady Rutland's case, 5 Rep. 26 *a*, 1st Res.

[2] Preston *v.* Morceau, 2 W. Bl. 1249 ; Rich *v.* Jackson, 4 Bro. Ch. R. 519, per Lord Thurlow ; Adams *v.* Wordley, 1 M. & W. 374 ; Parteriche *v.* Powlet, 2 Atk. 383, per Lord Hardwicke ; Bogert *v.* Cauman, Anthon's R. 70 ; Bayard *v.* Malcolm, 1 Johns. 467, per Kent, C. J.

[3] See ante, § 908, et seq.

[4] Wigram on Wills, 4, 7, 8, 117, 118.

[5] Id. ; Miller *v.* Travers, 8 Bing. 250, 251 ; Doe *v.* Hiscocks, 5 M. & W. 369 ; Clayton *v.* Lord Nugent, 13 M. & W. 205, per Alderson, B., 208, per Rolfe, B.

seems to be generally admitted as indisputable law, that the term, "written instrument," as used in the rule, includes, not only records, deeds, wills, and other instruments required by the statute or common law to be in writing, but every document, which contains the terms of a *contract* between different parties, and is designed to be the repository and evidence of their final intentions.[1]

§ 1037. To other *less formal documents the rule does not extend;* and, therefore, a *receipt*, except in some few special cases,[2] is not conclusive evidence of the payment therein acknowleged to have been made, but the party signing it may invalidate its effect by oral evidence, not only of fraud, but of mistake or surprise on his part; and in short, the document, like any verbal statement made by a person, and afterwards given in evidence to affect him, amounts only to primâ facie proof, and is capable of being explained.[3] So, an order for goods, insufficient to satisfy the Statute of Frauds, or a loose memorandum, which does not seem to have been intended by the parties to contain the terms of their contract, will not exclude parol evidence on that subject. For instance, where the defendant, having ordered goods by an unsigned letter, which did not mention any time for payment, afterwards accepted the goods which the plaintiff forwarded to him with the invoice, the Court held, in an action for their price, that parol evidence was admissible to show that the goods were really supplied on a credit, which had not expired at the commencement of the suit.[4] So, where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form:—"Bought of A. B., a horse for 7*l*.—A. B.,"—the Court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence, as the paper appeared to have been meant merely as a memo-

[1] Woolam *v.* Hearn, 7 Ves. 218, per Sir W. Grant; Shore *v.* Wilson, 9 Cl. & Fin. 540, per Williams, J.; Stackpole *v.* Arnold, 11 Mass. 31, per Parker, J.; Hunt *v.* Adams, 7 Mass. 522, per Sewell, J. [2] See ante, §§ 83, 774.

[3] Farrar *v.* Hutchinson, 9 A. & E. 641, 643; 1 P. & D. 437, S. C.; Skaife *v.* Jackson, 3 B. & C. 421; Wallace *v.* Kelsall, 7 M. & W. 273, 274; Fuller *v.* Crittenden, 9 Conn. 406.

[4] Lockett *v.* Nicklin, 2 Ex. R. 93. See § 1053, post.

randum of the transaction, or an informal receipt for the money, and not as containing the terms of the contract itself.[1] So, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term of the contract, namely, that all accidents occasioned by the *shying* of the horse should be at the risk of the hirer.[2] Again, in the sale of a chattel under the value of 10*l*., an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if when the article was put up to auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement.[3]

§ 1038.[4] Having thus pointed out the class of written instruments to which the rule applies, it may next be observed that the rule is not infringed by the admission of parol evidence, under the proper plea,[5] showing that the instrument is altogether *void*, or that it *never* had any *legal* existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter, or for want of due execution and delivery.[6] For instance, —to illustrate the last ground of invalidity first,—it may be shown by parol evidence, either that an instrument, apparently executed as a deed, had really been delivered simply as an escrow,[7] or that a document, signed as an agreement, had not been intended by the parties to operate as a present contract, but that it was meant to be conditional on the happening of an event which had never occurred.[8] *Fraud* practised by the party seeking the remedy

[1] Allen *v.* Pink, 4 M. & W. 140, 143, 144; 6 Dowl. 668, S. C.

[2] Jeffery *v.* Walton, 1 Stark. R. 267. For other instances, see ante, § 377.

[3] Eden *v.* Blake, 13 M. & W. 614. As to examinations of prisoners, see ante, §§ 816, 817. [4] Gr. Ev., § 284, in part. [5] Ante, § 257.

[6] Collins *v.* Blantern, 2 Wils. 341; 1 Smith Lead. Ca. 154—170; id. 4th ed., 263—288, S. C., and cases there cited in the notes; Paxton *v.* Popham, 9 East, 421, 422, per Ellenborough.

[7] Murray *v.* Earl of Stair, 2 B. & C. 82; 3 D. & R. 278, S. C.

[8] Pym *v.* Campbell, 25 L. J., Q. B., 277; 6 E. & B. 370, S. C.; Davis

upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title. "The covin," says Lord Coke, "doth suffocate the right." It matters not in this respect whether the foundation of the claim be a record, a deed, or a writing without seal; for in either case the instrument will be void if obtained by fraud, and the fraud may be established by parol evidence.[1] Thus, if a person has been induced by verbal fraudulent statements to enter into a written contract for the purchase of a house, a ship, or the like, it is competent for him, in an action on the case for a deceitful representation, to prove the fraud by evidence aliundè, though the written contract or the deed of conveyance is silent on the subject, to which the fraudulent representations refer.[2] So, the representation of a vendor respecting some particular quality of the article sold, may be given in evidence, if the purchaser has thereby been fraudulently prevented from discovering a fault which the vendor knew to exist.[3] The declarations, too, of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery;[4] and similar evidence will be received with the view of rebutting the presumption that an alteration, or interlineation, apparent on the face of the will, was made after its execution.[5] For this last purpose, however, the declarations of the testator must have been made before the writing was executed, though it matters not whether the instrument be, or be not, a holograph will.[6]

§ 1039.[7] Parol evidence may also, under the proper plea,[8] be offered to show that the contract was made for the furtherance

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v. Jones, 17 Com. B. 625. See also Gudgen v. Besset, 26 L. J., Q. B., 36; 6 E. & B. 986, S. C.

[1] Tait Ev. 327, 328; Buckler v. Millerd, 2 Ventr. 107; Filmer v. Gott, 4 Bro. P. C. 230; Taylor v. Weld, 5 Mass. 116, per Sedgwick, J.; Franchot v. Leach, 5 Cowen, 508; Dorr v. Munsell, 13 Johns. 431; Morton v. Chandler, 8 Greenl. 9; Com. v. Bullard, 9 Mass. 270.

[2] Dobell v. Stephens, 3 B. & C. 623; 5 D. & R. 490, S. C.; Wright v. Crookes, 1 Scott, N. R. 685, 698.

[3] Kain v. Old, 2 B. & C. 634, per Abbott, C. J.

[4] Doe v. Hardy, 1 M. & Rob. 525; Doe v. Allen, 8 T. R. 147.

[5] Doe v. Palmer, 16 Q. B. 747.

[6] Id.

[7] Gr. Ev., § 284, in part.

[8] Ante, § 257.

of objects *forbidden*, either by statute, or by common law;[1] or that the writing was obtained by *duress*;[2] or that the party was incapable of binding himself by reason of some legal impediment, such as infancy, coverture,[3] idiotcy, insanity, or intoxication;[4] or that the instrument came into the hands of the plaintiff without any absolute and final *delivery* by the obligor or party charged.[5]

§ 1040. The *want or failure of consideration* may also be proved by parol evidence, showing that the written agreement is not binding;[6] unless it be under seal, which in the absence of fraud, is conclusive evidence of a sufficient consideration.[7] But further, if *no* consideration is stated in a deed, the party will be allowed to prove one by extrinsic evidence;[8] and if the deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.[9] The onus, however, of proving the consideration will, in such a case, lie on the party claiming under the deed; for the mere statement in the operative part of an instrument that it was made for good and valuable consideration will not suffice to raise a presumption, as against parties disputing the validity of the deed, that any substantial consideration has ever in fact been given.[10] Again, if an instrument *under seal* specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another

[1] Collins *v.* Blantern, 2 Wils. 347; 1 Smith Lead. Ca. 154, 168, n.; id. 4th ed., 263, 279, S. C.; Benyon *v.* Nettlefold, 3 M. & Gord. 94. See also Biggs *v.* Lawrence, 3 T. R. 454; Waymell *v.* Reed, 5 T. R. 600; Doe *v.* Ford, 3 A. & E. 649; Sinclair *v.* Stevenson, 1 C. & P. 582; Norman *v.* Cole, 3 Esp. 253.

[2] 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig. Plead. 2, W. 18—23.

[3] Id.

[4] B. N. P. 172; Barrett *v.* Buxton, 2 Aik. 167, per Prentiss, J.

[5] B. N. P. 172; Clark *v.* Gifford, 10 Wend. 310; U. S. *v.* Leffler, 11 Peters, 86.

[6] Foster *v.* Jolly, 1 C. M. & R. 707, 708; Solly *v.* Hinde, 2 Cr. & Mee. 516; Abbott *v.* Hendricks, 1 M. & Gr. 791, 794—796; ante, § 935.

[7] Ante, § 73.

[8] Peacock *v.* Monk, 1 Ves. Sen. 128.

[9] 2 Ph. Ev. 353; Tull *v.* Parlett, M. & M. 472, per Tindal, C. J.

[10] Kelson *v.* Kelson, 10 Hare, 385, per Wood, V. C.

can in general be given, because such proof would contradict the deed.[1] Still, if the object be to establish or negative the existence of fraud, such proof will be admissible. Thus, where a conveyance purported to have been made in consideration of 10,000*l.*, and natural love and affection, the Court, in a suit to set it aside, admitted extrinsic evidence to show that the estates were worth 30,000*l.*, and that natural love and affection constituted no part of the real consideration.[2] So, where a father assigned his house and personalty to his son by deed, "in consideration of natural love and affection," and afterwards the sheriff seized part of the personalty under a fi-fa. against the father, the son, in proceeding against the sheriff, was permitted to give evidence of a valuable consideration, and thus to rebut the presumption of fraud against creditors, which a deed, made by a debtor in consideration of natural love and affection, primâ facie imports.[3]

§ 1041. Courts of Equity will also sometimes admit parol evidence to contradict or vary a writing, where, by some *mistake in fact*,[4] it speaks a different language from what the parties intended; and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms. In all cases, however, of this kind, the party seeking relief undertakes a task of great difficulty, since a Court of Equity will not interfere, unless it be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected.[5] A *plaintiff* may seek the relief in equity by filing a bill, either to *reform* the writing,—in which event it will be

[1] Peacock *v.* Monk, 1 Ves. Sen. 128, per Lord Hardwicke; cited by Alderson, B., in Gale *v.* Williamson, 8 M. & W. 408.

[2] Filmer *v.* Gott, 7 Bro. P. C. 70; cited by Lord Kenyon in R. *v.* Scammondon, 3 T. R. 475, 476.

[3] Gale *v.* Williamson, 8 M. & W. 405, 409—411; Pott *v.* Todhunter, 2 Coll. C. R. 76, 84. See 13 Eliz. c. 5.

[4] See Hunt *v.* Rousmanier, 8 Wheaton, 211, et seq.

[5] M. of Townsend *v.* Strangroom, 6 Ves. 339; Mortimer *v.* Shortall, 2 Dru. & War. 371, per Sugden, C.; Bold *v.* Hutchinson, 5 De Gex, M. & Gord. 558; Wright *v.* Goff, 22 Beav. 207, 214; Ashhurst *v.* Mill, 7 Hare, 502; Gillespie *v.* Moon, 2 John. Ch. R. 585.

necessary to satisfy the Court that the mistake was made on *both* sides;[1] or to *rescind* the instrument,—in which case, though conclusive proof of error or surprise on the plaintiff's part alone will suffice,[2] it must appear that the mistake was one of vital importance.[3] In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the Court in granting the relief prayed.[4]

§ 1042. A *defendant*, also, against whom a specific performance of a written agreement is sought, may insist by way of answer upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract.[5] But here an artificial distinction must be noticed, which appears to be recognised as undoubted law in British courts of equity, and which is this: that though parol evidence may be received *against* a plaintiff seeking a specific performance, it will be inadmissible in his *favour*; or, in other words, Courts of Equity will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution.[6] In America,

[1] Mortimer *v.* Shortall, 2 Dru. & War. 372, per Sugden, C.; Murray *v.* Parker, 19 Beav. 305; Rooke *v.* Ld. Kensington, 2 Kay & J. 753.

[2] Id.

[3] 1 Story Eq. Jur. § 144, n.

[4] Mortimer *v.* Shortall, 2 Dru. & War. 374, per Sugden, C.; Alexander *v.* Crosbie, Lloyd & Goold, R. temp. Sugden, 150; M. of Townsend *v.* Strangroom, 6 Ves. 339; Gillespie *v.* Moon, 2 John. Ch. R. 600, per Kent, C.

[5] 1 Story Eq. Jur. § 161; 2 id. § 770; M. of Townsend *v.* Strangroom, 6 Ves. 328; Davies *v.* Fitton, 2 Dru. & War. 232, per Sugden, C.; Wood *v.* Scarth, 2 Kay & J. 33; Manser *v.* Back, 6 Hare, 443, per Wigram, V. C.; Howard *v.* Wright, 2 Coop. C. P. R. 114, per Sir John Leach, V. C.; Squire *v.* Campbell, id. 114, per Lord Cottenham. See Carpenter *v.* Providence Washington Ins. Co., 4 Howard, S. Ct. R. 222.

[6] Davies *v.* Fitton, 2 Dru. & War. 232, per Sugden, C.; Marq. of Town-

however, Mr. Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject this distinction as unfounded in justice;[1] and Mr. Justice Story has taken the same view of the matter, observing, with much force, that there is no mutuality or equality in the operation of such a doctrine.[2]

§ 1043.[3] The rule under discussion does not exclude verbal evidence, when adduced to prove that the written agreement has been *totally waived or discharged.* If, indeed, the agreement be by *deed,* it can only be entirely, or even partially, dissolved by an instrument of an equally solemn character; for the maxim of law is well established, that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur.*[4] Therefore, where to an action of covenant for non-payment of money, the defendant pleaded a parol discharge in satisfaction of all demands, the Court held, upon demurrer, that the covenant could not be discharged without a deed.[5] A similar decision was pronounced on a rule obtained by the plaintiff for judgment non obstante veredicto, in a case where an action had been brought by a landlord against his tenant, on a covenant by the latter to yield up, at the expiration of the term, all erections set up during the tenancy; the defendant having obtained a verdict on a plea stating an agreement between the parties, that, if the defendant built a greenhouse

send *v.* Strangroom, 6 Ves. 328; Woolam *v.* Hearne, 7 Ves. 211; Higginson *v.* Clowes, 15 Ves. 516; Clowes *v.* Higginson, 1 Ves. & Bea. 375; Rich *v.* Jackson, 4 Bro. C. C. 514; 6 Ves. 334, n. S. C.; Clinan *v.* Cooke, 1 Sch. & Lef. 38, 39; Att.-Gen. *v.* Sitwell, 1 You. & Col., Ex. R., 559, 583; Squire *v.* Campbell, 2 Coop. C. P. R. 114, per Lord Cottenham.

[1] Keisselbrack *v.* Livingstone, 4 Johns. Ch. R. 144, 148, 149.

[2] 1 Story Eq. Jur. § 161, and note. Those who require further information on this subject are referred to 1 Sugden, V. & P. 222—233, and 258—266; 1 Story Eq. Jur. §§ 152—161; Gresley Ev. 205—209.

[3] Gr. Ev., § 302, in part, as to first five lines.

[4] 2 Inst. 360; Wingate's Maxims, 68—72; Story on Agen. § 49; Fowell *v.* Forrest, 2 Saund. R. 47 ff, 47 gg; Harris *v.* Goodwyn, 2 M. & Gr. 405; 2 Scott, N. R. 459, S. C.; Doe *v.* Gladwin, 6 Q. B. 953, 962; Rawlinson *v.* Clarke, 14 M. & W. 187, 192.

[5] Rogers *v.* Payne, 2 Wils. 376, recognised in West *v.* Blakeway, 2 M. & Gr. 751; Cordwent *v.* Hunt, 8 Taunt. 596. See Spence *v.* Healey, 8 Ex. R. 668; Mayor of Berwick *v.* Oswald, 1 E. & B. 295.

on the premises, he should be at liberty to remove it.[1] So, it matters not, at common law, whether the agreement in discharge of the deed be in writing or merely verbal, or whether it be executory or executed; and, therefore, if an act is required by deed to be done within a certain time, evidence cannot be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.[2] In this latter event, however, Courts of Equity will perhaps grant relief.[3]

§ 1044. As the doctrine just stated has nothing to do with the general rule under discussion, but rests entirely on the solemn nature of deeds, any obligation by writing, which is not under seal, may, in the *absence of statutory interference*, be either *totally or partially dissolved before breach, by a subsequent oral agreement*; or, to adopt the language of Lord Denman in Goss *v.* Lord Nugent,[4] "After an agreement [at common law] has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement."

§ 1045. With respect to those cases where a writing is by statute made necessary to the validity of an agreement, the rule is different; for, although the better opinion seems to be, that contracts concerning the sale of lands or goods, which fall within the

[1] West *v.* Blakeway, 2 M. & Gr. 729; 3 Scott, N. R. 199, S. C. But see Cort *v.* Ambergate &c. Rail. Co., 17 Q. B. 127, 145, 146.

[2] Gwynne *v.* Davy, 1 M. & Gr. 857, 871, per Tindal, C. J.; Littler *v.* Holland, 3 T. R. 590.

[3] Gwynne *v.* Davy, 1 M. & Gr. 868, per Tindal, C. J.

[4] 5 B. & Ad. 65. By the law of Scotland, no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. Tait Ev. 325.

4th or 17th section of the Statute of Frauds, may be *wholly waived* or *abandoned* by a *subsequent oral agreement* so as to prevent either party from recovering on the original written contract, this doctrine rests on the peculiar language of the Act of Charles the Second, which, without distinctly stating that the contracts in question must be in writing, merely enacts that, unless they are so, no action shall be brought upon them.[1] No general rule, therefore, can with safety be laid down respecting the validity of the oral dissolution of a statutory instrument; but in each case the special language of the Act requiring the writing must be duly considered; and in several cases, as, for instance, in that of a will, it is clear law that a verbal abandonment will not suffice.[2]

§ 1046. But whatever may be the effect of an oral dissolution of the entire statutory contract, thus much is certain, that *no verbal agreement to abandon it in part, or to add to, or modify, its terms, can be received;* for, to allow such contracts to be proved partly by writing, and partly by oral testimony, would be to let in all the mischiefs which it was the object of the Legislature to exclude; and here it matters not what term of the written contract is sought to be varied by parol, since no distinction can be drawn between the material and immaterial parts of the contract; but everything which originally formed part of the agreement, in regard to which the parties are stipulating, must be deemed to be material.[3]

§ 1047. If, then, a written contract is made for the sale, either of goods above the value of 10*l.*, or of lands, and the writing states a time for the delivery of the goods, or for the completion of the purchase, no verbal agreement to substitute another day

[1] Goss *v.* Lord Nugent, 2 B. & Ad. 58, 65, 66, per Lord Denman; 2 N. & M. 28, S. C.; Price *v.* Dyer, 17 Ves. 356, per Sir W. Grant. These dicta go far towards overruling a contrary opinion expressed by Lord Hardwicke in Buckhouse *v.* Crossby, 2 Eq. Cas. Ab. 32 pl. 44, and in Bell *v.* Howard, 9 Mod. 305.

[2] Ante, § 980.

[3] Marshall *v.* Lynn, 6 M. & W. 116, 117, per Parke, B.; Emmet *v.* Dewhirst, 21 L. J., Ch., 497; Moore *v.* Campbell, 10 Ex. R. 323.

for the one originally agreed upon will be valid.[1] So, where a vendor had contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, the Court held, that, in an action for the purchase money, he was not at liberty to show a verbal waiver by the purchaser of his right to a good title as to one lot; since the effect of such a waiver was to substitute a partly oral contract for the one which the Statute of Frauds required to be in writing.[2] So, where a master had agreed by letter to pay his clerk a *yearly* salary, and the contract was necessarily in writing, being one which would not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a contemporaneous or subsequent verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made.[3] Again, if an entire written agreement consists of divers particulars, some of which are within, and others without, the operation of the Statute of Frauds, a verbal agreement to vary the latter part in even some trifling particular, as, for instance, to have one valuer instead of two, cannot be received in evidence, though that part of the contract might, of itself, have been good without writing.[4]

§ 1048. In applying this doctrine to *testamentary instruments*, care must be taken to mark the distinction between the revocation of a will and the ademption, or, rather, the payment by anticipation, of a legacy; for although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy. Thus, where a testator bequeathed 3000*l.* to his daughter for her separate use for life, with remainder to her children, and gave the residue of his property to his son, it was held by Vice-Chancellor Wigram, in a suit by the children of the daughter

[1] Stowell *v.* Robinson, 3 Bing. N. C. 928; Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 A. & E. 57; 2 P. & D. 447, S. C. These cases overrule Cuff *v.* Penn, 1 M. & Sel. 21; Warren *v.* Stagg, cited in Littler *v.* Holland, 3 T. R. 591; and Thresh *v.* Rake, 1 Esp. 53.

[2] Goss *v.* Lord Nugent, 5 B. & Ad. 58; 2 N. & M. 28, S. C.

[3] Giraud *v.* Richmond, 2 Com. B. 835.

[4] Harvey *v.* Grabham, 5 A. & E. 61, 74; 6 N. & M. 164, S. C.

against the son, claiming to have the legacy invested and secured for their benefit, that the defendant might show by extrinsic parol evidence, that, after the date of the will, the testator, at his daughter's request, had paid her husband 500*l.*, and had then declared that this sum was to be considered in part satisfaction of the legacy; and that he had expressed his determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so.[1] It will be seen that the evidence here admitted did not in any way revoke or alter the will, but simply proved a transaction, whereby the daughter had in part received her legacy by anticipation; and the declarations of the testator, being contemporaneous with the advance of the money, were rightly considered as part of that transaction.

§ 1049. It is almost superfluous to observe, that the rule is not infringed by proof of any *collateral* parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter. For instance, where parties to an indenture of charter-party afterwards agreed by parol to use the ship for a period which was to elapse before the charter-party attached, it was held that this latter contract might be enforced by action of assumpsit.[2] It would even seem, that, if money be received by a party, under circumstances raising an implied promise to pay it to another, or under an express promise so to do, and subsequently a deed be entered into between these parties in order to ascertain the amount to be paid, an action of simple contract can be sustained.[3] But if a debt be secured by deed, the mere subsequent statement of an account respecting it will not justify the creditor in bringing an action on an account stated, but he must still declare on the specialty, as the striking of a balance under these circumstances creates no new liability.[4]

[1] Kirk *v.* Eddowes, 3 Hare, 509.
[2] White *v.* Parkin, 12 East, 578. See Seago *v.* Deane, 4 Bing. 459; Fletcher *v.* Gillespie, 3 Bing. 635; Foster *v.* Allanson, 2 T. R. 479.
[3] Edwards *v.* Bates, 7 M. & Gr. 600, 601, per Cresswell, J.
[4] Middleditch *v.* Ellis, 2 Ex. R. 623.

§ 1050.[1] Next, the rule does not restrict the Court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, all *contemporaneous writings* relating to the same subject-matter, are admissible in evidence, provided only that they be of equal solemnity with the principal document, and that no oral testimony be required for the purpose of connecting them therewith.[2]

§ 1051.[3] It may further be remarked, that the rule is *applied only in suits between the parties* to the instrument, and their representatives; as they alone are to blame if the writing contains what was not intended, or omits what it should have contained. It cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others.[4] Thus, in a settlement case, where the value of an estate upon which the validity of the settlement rested was in question, evidence of a greater sum having been paid for it than was recited in the purchase deed was held admissible.[5] So, in a similar case, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another.[6] So, also, to show that, at the time of entering into a contract of service in a particular employment, a further agreement was made to pay a sum of money as a premium for teaching

[1] Gr. Ev., § 283, in part.

[2] Leeds v. Lancashire, 2 Camp. 205; Hartley v. Wilkinson, 4 Camp. 127; Stone v. Metcalf, 1 Stark. R. 53; Bowerbank v. Monteiro, 4 Taunt. 846, per Gibbs, J.; Gale v. Williamson, 8 M. & W. 405; Brown v. Langley, 4 M. & Gr. 466, 470; Hunt v. Livermore, 5 Pick. 395; Davlin v. Hill, 2 Fairf. 434; Couch v. Meeker, 2 Conn. 302; Lee v. Dick, 10 Pet. 482; Bell v. Bruen, 17 Pet. 161; ante, § 937.

[3] Gr. Ev., § 279, as to first nine lines.

[4] Ante § 510; 1 Poth. Obl. by Evans, p. 4, c. 2, art. 3, n. 766; R. v. Cheadle, 3 B. & Ad. 838; Krider v. Lafferty, 1 Whart. 303, 314, per Kennedy, J.; Reynolds v. Magness, 2 Iredell, R. 26.

[5] R. v. Scammonden, 3 T. R. 474; R. v. Olney, 1 M. & Sel. 387; R. v. Cheadle, 3 B. & Ad. 833.

[6] R. v. Wickham, 3 A. & E. 517.

the pauper the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained.[1] In another pauper case, where an unstamped assignment of a parish apprentice stated that the new master, in consideration of 3*l.* paid him by the old master, agreed to accept the apprentice, &c., parol evidence that the money was in fact paid, not by the old master, but by the parish-officer, was admitted for the purpose of showing that the instrument did not require a stamp.[2]

§ 1052. Some of the cases cited in the last section seem to have been determined, not only on the ground that the contending parties were strangers to the deed, but on the principle that, though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument.[3] Indeed, it appears that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the *recitals* of *formal matter*, which may well be presumed not to have been stated with careful precision.[4] For instance, parol evidence has, on several occasions, been admitted to *contradict the recited date of a deed*, order, or other instrument; as, by proving that a charter-party, dated February the 6th, conditioned to sail on or before February the 12th, was not executed till after the latter day, and that therefore the condition was dispensed with;[5] or by showing, in answer to an objection that a notice of appeal was given too late, that the order, though bearing date the 24th of June, was in fact not signed by the justices till three days afterwards.[6]

§ 1053. Having now, by a series of negative propositions, pointed

[1] R. *v.* Laindon, 8 T. R. 379.
[2] R. *v.* Llangunnor, 2 B. & Ad. 616.
[3] R. *v.* Stoke upon Trent, 5 Q. B. 308, per Williams, J.
[4] 3 St. Ev. 787, 788; 2 Poth. on Obl. by Evans, 181, 182.
[5] Hall *v.* Cazenove, 4 East, 477. See Steele *v.* Mart, 4 B. & C. 273; Cooper *v.* Robinson, 10 M. & W. 694.
[6] R. *v.* Flintshire, 3 Dowl. & L. 537, per Williams, J.

out the several classes of cases to which the rule under consideration does not extend, it will be expedient to advert shortly to some of the leading cases in which the rule has been actually applied, and parol evidence has been rejected. The reason and policy of the rule will thus best be seen, as well as its nature and extent. For example,[1] where a policy of insurance was effected on goods "in ship or ships from Surinam to London," parol evidence was held inadmissible to show, that a particular ship which was lost, had been verbally excepted at the time of the contract.[2] So, where a policy described the two termini of the voyage, the insurers were not allowed to prove by parol evidence that the risk was not to commence till the vessel reached an intermediate place.[3] So, where the instrument purported to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that the payment should be postponed,[4] or depend upon a contingency,[5] or be made out of a particular fund, has been rejected;[6] and where goods were sold under a written contract, which was silent as to the time when they were to be taken away and payment was to be made, parol evidence was held inadmissible to prove, either that the goods were to be removed by the purchaser immediately,[7] or that they were sold on a credit of six months.[8] Again, where a written agreement of partnership was unlimited as to the time of commencement, parol

[1] Gr. Ev., § 281, in part. [2] Weston v. Emes, 1 Taunt. 115.

[3] Kaines v. Knightly, Skin. 54; Leslie v. De la Torre, cited 12 East, 583.

[4] Hoare v. Graham, 3 Camp. 57; Spartali v. Benecke, 10 Com. B. 212; Besant v. Cross, id. 895; Hanson v. Stetson, 5 Pick. 506; Spring v. Lovett, 11 Pick. 417.

[5] Rawson v. Walker, 1 Stark. R. 361; Adams v. Wordley, 1 M. & W. 374; Foster v. Jolly, 1 C. M. & R. 703; 5 Tyr. 239, S. C.; Free v. Hawkins, 8 Taunt. 92: Woodbridge v. Spooner, 3 B. & A. 233; Moseley v. Hanford, 10 B. & C. 729; 5 M. & R. 607, S. C.; Erwin v. Saunders, 1 Cowen, 249; Hunt v. Adams, 7 Mass. 518. See Salmon v. Webb, 3 H. of L. Cas. 510; Webb v. Salmon, 13 Q. B. 886, 894, S. C.

[6] Campbell v. Hodgson, Gow, N. P. R., 74.

[7] Greaves v. Ashlin, 3 Camp. 426, per Lord Ellenborough. See also Harnor v. Groves, 15 Com. B. 667.

[8] Ford v. Yates, 2 M. & Gr. 549; 2 Scott, N. R. 645, S. C. In that case the Court erroneously assumed, that the memorandum, which really contained the name of only one of the parties, was sufficient to satisfy the

evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, was held inadmissible.[1] So, in an action for use and occupation, upon a written memorandum of lease at a certain rent, parol evidence has been rejected of a contemporaneous verbal agreement to pay a further sum, being the ground-rent of the premises, to the ground-landlord.[2] So, where a ship was particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, was held inadmissible to charge the vendor, without proof of actual fraud; all previous conversation being merged in the written contract.[3] So, where a deed conveyed the messuage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule, had always been occupied and treated as part of Gotton farm, was rejected.[4]

§ 1054. If a promissory note be in its terms joint, evidence cannot be given that one of the makers was merely a surety, and that the payee has given time to the principal.[5] So, if land, let for years, be sold by the lessor, a contemporaneous parol agreement, that the current quarter's rent should be apportioned between the vendor and purchaser, will be inadmissible.[6] Again, if a party signs a bill of exchange, or, indeed,

statute of frauds; and on such assumption the decision was correct. See Lockett v. Nicklin, 2 Ex. R. 98—100, cited ante, § 1037.

[1] Dix v. Otis, 5 Pick. 38.

[2] Preston v. Merceau, 2 W. Bl. 1249. See the Isabella, 2 Rob. Adm. 241; White v. Wilson, 2 B. & P. 116; Rich v. Jackson, 4 Bro. Ch. R. 514; Brigham v. Rogers, 17 Mass. 571.

[3] Pickering v. Dowson, 4 Taunt. 779. See also Powell v. Edmunds, 12 East, 6; Pender v. Fobes, 1 Dev. & Bat. 250; Wright v. Crookes, 1 Scott, N. R. 685.

[4] Barton v. Dawes, 10 Com. B. 261; Llewellyn v. Jersey, E. of, 11 M. & W. 183. See post, § 1108.

[5] Abbott v. Hendricks, 1 M. & Gr. 794, per Tindal, C. J.; Manley v. Boycot, 2 E. & B. 46; Strong v. Foster, 25 L. J., C. P., 106; 17 Com. B. 201, S. C. See Davies v. Stainbank, 6 De Gex, M. & Gord. 679. See Riley v. Gerrish, 9 Cush. 104; and Myrick v. Daine, id. 248.

[6] Flinn v. Calow, 1 M. & Gr. 589.

any written contract, in his own name, he cannot avoid his personal liability by giving parol evidence that he merely signed as the agent of another, and that the party with whom he contracted was aware of that fact;[1] although if the object be on the one hand to charge with liability,[2] or on the other, to give the benefit of the contract to,[3] the unnamed principal, such evidence will be received; and this, too, whether the Statute of Frauds does or does not require the agreement to be in writing. The distinction between these two cases is, that, in the former the parol evidence would clearly contradict the written agreement, but in the latter it would have no such effect; for, without denying that the agreement was binding on the party whom it purported to bind, the evidence would merely go to show that another party, namely the principal, was also bound, on the well known doctrine that the act of an authorised agent is, in law, the act of the principal.[4] Again, though a person were to describe himself in a written contract as the agent of an unnamed principal, he might be shown to be the real principal in the event of his being sued by the party with whom he contracted.[5] Nay, in an action brought by himself against the other contracting party, he might repudiate the character of agent and adopt that of principal; and on furnishing proof that he entered into the agreement on his own behalf, he would be entitled to recover in his own name.[6] Where, however, an agent, who was employed to enter into a charter-party, described himself in the instrument as the *owner* of the ship, it was held, in an action by the principal on the charter-party, that the agent could not give parol evidence of his having acted merely as agent

[1] Higgins *v.* Senior, 8 M. & W. 834; Sowerby *v.* Butcher, 2 Cr. & Mee. 371; 4 Tyr. 320, S. C.; Magee *v.* Atkinson, 2 M. & W. 440; Jones *v.* Littledale, 6 A. & E. 486; 1 N. & P. 677, S. C.; Stackpole *v.* Arnold, 11 Mass. 27; Hunt *v.* Adams, 7 Mass. 518; Shankland *v.* City of Washington, 5 Peters, 394; Lefevre *v.* Lloyd, 5 Taunt. 749; 1 Marsh. 318, S. C.

[2] Paterson *v.* Gandasequi, 15 East, 62; cited and confirmed in Higgins *v.* Senior, 8 M. & W. 844, per Parke, B.

[3] Garrett *v.* Handley, 4 B. & C. 664; Bateman *v.* Phillips, 15 East, 272; both cited and confirmed in 8 M. & W. 844, per Parke, B.

[4] Higgins *v.* Senior, 8 M. & W. 844, 845, per Parke, B.

[5] Carr *v.* Jackson, 7 Ex. R. 382.

[6] Schmeltz *v.* Avery, 16 Q. B. 655.

for the plaintiff, since such evidence would directly contradict the language contained in the written document.[1]

§ 1055.[2] Even the subsequent admission of the party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein contained.[3] Thus, where a deed purported to convey a messuage in the occupation of A., *with the appurtenances*, and it appeared that A. had occupied a small adjoining garden with the house, the written conditions of sale excepting the garden, and the declarations of the grantee that he had not purchased it, were held inadmissible to contradict the plain language of the deed, under which the garden had clearly passed as appurtenant to the messuage.[4]

§ 1056. Still less will any statements made by the writer of the instrument be receivable in evidence with the view of varying its terms. Thus, where a testator devised to his eldest son his residence with the *buildings to the same adjoining*, and left to his second son all his other real property, declarations made by him, while giving instructions for his will, were rejected,—they being tendered to show that he intended some cottages, which it was proved adjoined his residence, at the time when the will was made, to pass to his second son.[5] Again, it is well established that where, in a will, a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator;[6] and the principle, of course, is precisely the same, whether it be the person of the devisee, or the estate or thing devised, which is left in blank.[7]

[1] Humble *v.* Hunter, 12 Q. B. 310.

[2] Gr. Ev., § 281, as to first three lines.

[3] Paine *v.* M'Intier, 1 Mass. 69, as explained in 10 Mass. 461. See also Townsend *v.* Weld, 8 Mass. 146.

[4] Doe *v.* Webster, 12 A. & E. 442 ; 4 P. & D. 270, S. C.

[5] Doe *v.* Holtom, 4 A. & E. 76.

[6] Hunt *v.* Hort, 3 Bro. C. C. 311 ; Miller *v.* Travers, 8 Bing. 253, 254, per Tindal, C. J.

[7] Miller *v.* Travers, 8 Bing. 254, per Tindal, C. J. ; Taylor *v.* Richardson, 2 Drew. 16.

§ 1057. The case of Miller *v.* Travers[1] furnishes an apt illustration of the rule under discussion. There, the testator devised all his freehold and real estate "in the county of Limerick, and in the city of Limerick." He had no real estates in the county of Limerick, but his landed property consisted of estates in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the testamentary charges. Under these circumstances the Court held, that the devisee could not be allowed to show by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake[2] he erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. "The plaintiff," said Chief Justice Tindal, in pronouncing the joint opinion of himself, Lord Lyndhurst, and Lord Chancellor Brougham,[3] "contends that he has a right to prove that the testator intended to pass not only the estate in the city of *Limerick*, but an estate in a county not named in the will, namely, the county of *Clare*, and that the will is to be read and construed as if the word Clare stood in the place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted."[4]

[1] 8 Bing. 244. See also in re the Clergy Society, 2 Kay & J. 615.

[2] See also Francis *v.* Dichfield, 2 Coop. C. P. R. 531, per Ld. Hardwicke.

[3] Lord Lyndhurst, C. B., and Tindal, C. J., had been summoned to assist the Lord Chancellor in this case.

[4] 8 Bing. 249, 250.

§ 1058. The language of Chief Justice Tindal just cited leads naturally to the consideration of another rule, which is this; namely, that, although extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is inadmissible; first, because the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and secondly, because of the mischiefs which would result, if verbal testimony were in such cases received; still *parol evidence may in all cases of doubt be adduced, to explain the written instrument;* or, in other words, to enable the Court to discover the meaning of the terms employed, and to apply them to the facts.[1] Now, the *doubt* here adverted to may arise from one or both of the two following causes; either the *language* of the instrument may be *unintelligible* to the Court, or, at least, be *susceptible of two or more meanings;* or the *persons or things* mentioned *may require to be identified.*[2] The rule, therefore, embraces two descriptions of evidence.

§ 1059.[3] And first, if the characters, in which the instrument is written, are in short-hand,[4] or are otherwise difficult to be decyphered,—or if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the Court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in decyphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions.[5] The first branch of this rule has been acted upon in several cases, where wills, written in a scarcely legible hand, have been interpreted by Courts of Equity, with the assistance of

[1] Shore v. Wilson, 9 Cl. & Fin. 555, per Parke, B.
[2] 9 Cl. & Fin. 555, 556, per Parke, B.; 566, 567, per Tindal, C. J.
[3] Gr. Ev., § 280, in part.
[4] See Kell v. Charmer, 23 Beav. 195, cited post, § 1083.
[5] 9 Cl. & Fin. 555, 556, per Parke, B.; 566, 567, per Tindal, C. J.; Wigram on Wills, 48.

persons skilled in writing.[1] The practice of proving translations of foreign documents is so notorious as to require no authority to support it; while the remainder of the rule is established beyond dispute by an absolute cloud of decisions.

§ 1060. Before adverting more particularly to these decisions, it may be well to observe, that in cases of this nature the testimony resorted to consists for the most part of evidence of *usage*; that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognised practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning. The jury are then asked to presume that the parties, who employed these expressions, intended to use them, and did use them, in the conventional sense as explained by the witnesses.[2] The term "usage" as here interpreted, should be distinctly understood, because it will presently be seen,[3] that the same word is frequently used by lawyers to denote a species of evidence, which is often admitted for the purpose of explaining ancient ambiguous grants, and which consists in the proof of the contemporaneous acts of the grantors or grantees, in relation to the property conveyed.

§ 1061. In resorting to evidence of *usage* for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical;—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or tråde, or by a particular class of persons;—and words which have two meanings, the one common and universal, the other technical, peculiar, or local. In either case, extrinsic evidence of usage will alike be admissible to define and explain the technical, peculiar, or local meaning of the language employed; though in the latter case, it will also be necessary to prove such additional circumstances, as will raise a presumption that the

[1] Goblet *v.* Beechey, 3 Sim. 24; Wigram on Wills, 184, 196, S. C.; Masters *v.* Masters, 1 P. Wms. 425; Norman *v.* Morrell, 4 Ves. 769.

[2] See ante, § 148.

[3] Post, §§ 1090, 1091.

parties intended to use the words in what logicians call their second intention, unless this fact can be inferred from reading the instrument itself. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as "Godly preachers of Christ's Holy Gospel," and it became necessary to determine a few years ago what persons were entitled to the charity,—extrinsic evidence was admitted to show, that at that period of history a religious sect existed, who applied this particular phraseology, capable though it seemed at first sight of a far wider interpretation, to Protestant Trinitarian dissenters, and that the founder was herself a member of such sect.[1]

§ 1062.[2] So the words, "inhabitant,"[3]—"level,"[4] as understood by miners,—"thousand,"[5] as locally applied to rabbits on a warren,—"weeks," as used in a theatrical contract,[6]—"months," as meaning calendar months in a charter-party,[7]—"days," as meaning working days in a bill of lading,[8]—"fur,"[9]—"corn,"[10]—"pig-iron,"[11]—"salt,"[12]—"freight,"[13]—and many other expressions, which primâ facie presented no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connexion with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under

[1] Shore v. Wilson, 9 Cl. & Fin. 355, 580, per Lord Cottenham. See also, Att.-Gen. v. Drummond, 1 Dru. & War. 353; Drummond v. Att.-Gen., 2 H. of L. Cas. 837, 857, S. C., on appeal; and 7 & 8 Vict., c. 45, noticed ante, § 65.

[2] Gr. Ev., § 280, in part.

[3] R. v. Mashiter, 6 A. & E. 153; R. v. Davie, id. 386.

[4] Clayton v. Gregson, 5 A. & E. 302.

[5] Smith v. Wilson, 3 B. & Ad. 728; recognised by Williams, J., in Shore v. Wilson, 9 Cl. & Fin. 543.

[6] Grant v. Maddox, 15 M. & W. 737.

[7] Jolly v. Young, 1 Esp. 186; recognised in Simpson v. Margitson, 11 Q. B. 32.

[8] Cochran v. Retberg, 3 Esp. 121.

[9] Astor v. Union Ins. Co., 7 Cowen, 202.

[10] Mason v. Skurray and Moody v. Surridge, Park, Ins. 245; Scott v. Bourdillion, 2 N. R. 213.

[11] Mackenzie v. Dunlop, 3 Macq. Sc. Cas., H. of L. 26, per Ld. Cranworth, C.

[12] Journu v. Bourdieu, Park, Ins. 245.

[13] Peisch v. Dickson, 1 Mason, 11, 12; Gibbon v. Young, 2 B. Moore, 224; Lewis v. Marshall, 7 M. & Gr. 729, 743, 744; 8 Scott, N. R. 477, S. C.

investigation.[1] So, the meaning of the phrase, "duly honoured," when applied to a bill of exchange,[2]—of the words "in turn to deliver," contained in a charter-party,[3]—and of the expression, "in the month of October," as fixing the part of the month, within which a vessel was to sail,[4]—has been ascertained by parol evidence of mercantile usage. So, where a ship was warranted "to depart with convoy," extrinsic evidence was admitted to show at what place convoy for such a voyage as the one then contemplated was usually taken; and to that place the parties were presumed to refer.[5] Again, where one of the subjects of a charter-party was "cotton in bales," oral evidence of the mercantile meaning of this term was received;[6] and it has been proved by similar testimony, that the words, "expected to arrive about November next," when used in a bought note, created no contract as to time, but were a mere representation.[7] So parol evidence has been admitted to show, that, by usage in the hop trade, a sale of "ten pockets of Kent hops at 5*l*.," means 5*l*. per cwt.[8] So, where goods having been sent to a London packer to prepare for exportation, he acknowledged their receipt "on account of the vendor for the vendee," evidence of usage was admitted to prove, that, when packers signed receipts in this form, it was their duty not to part with the goods without the vendor's further orders.[9] So, also, where an Irish corn-merchant had sent written instructions to his del credere agent in London, to sell some oats "*on his account*," parol evidence was held admissible on the agent's part, for the purpose of showing that, by the custom of the London corn trade, he was warranted under these instructions in selling in his own name.[10]

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[1] See Lewis *v.* Marshall, 7 M. & Gr. 729, and cases collected at p. 738 of that report.

[2] Lucas *v.* Groning, 7 Taunt. 164.

[3] Robertson *v.* Jackson, 2 Com. B. 412; Leidemann *v.* Schultz, 14 Com. B. 38.

[4] Chaurand *v.* Angerstein, Pea. R. 43. See also Robertson *v.* Jackson, 2 Com. B. 412; U. S. *v.* Breed, 1 Sumn. 159.

[5] Lethulier's case, 2 Salk. 443; recognised by Williams, J., in Shore *v.* Wilson, 9 Cl. & Fin. 543.

[6] Taylor *v.* Briggs, 2 C. & P. 525; Gorrissen *v.* Perrin, 27 L. J., C. P. 29.

[7] Bold *v.* Rayner, 1 M. & W. 343; Tyr. & Gr. 820, S. C.

[8] Spicer *v.* Cooper, 1 Q. B. 424; 1 G. & D. 52, S. C.

[9] Bowman *v.* Horsey, 2 M. & Rob. 85, per Lord Abinger.

[10] Johnston *v.* Usborne, 11 A. & E. 549.

§ 1063. The reports contain many cases, where the language of *policies* has been explained by evidence of the understood practice of making voyages in particular branches of trade.[1] For instance, though, according to the general import of the words "at and from," a policy would attach upon the ship's first mooring in a harbour on the coast; yet where these expressions were employed in a Newfoundland policy, they were explained by evidence of usage to mean, that the risk should not commence till the expiration of the fishing, technically called "banking," or of an intermediate voyage.[2] In all cases of this kind, it is unnecessary for the assured or his broker to communicate the usage to the underwriter, because, as Lord Mansfield has observed, "every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself."[3]

§ 1064. But though *evidence of usage* may be admissible to explain what is doubtful, it is *not admissible to contradict or vary what is plain*;[4] and therefore, if the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless the words, if interpreted according to their strict legal acceptation, be wholly insensible with reference, either to the context, or to the extrinsic facts.[5] Thus, if a word denoting weight, measure, or number, has had a definite meaning attached to it by the Legislature, parties using that word in a written contract, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some

[1] See Trueman *v.* Loder, 11 A. & E. 600; and Milward *v.* Hibbert, 3 Q. B. 135, 137.

[2] Vallance *v.* Dewar, 1 Camp. 503, 508, per Lord Ellenborough; Ougier *v.* Jennings, id. 505, 506, n. per Lord Eldon; Kingston *v.* Knibbs, id. 508, per Lord Ellenborough.

[3] Noble *v.* Kennaway, 2 Doug. 513; cases cited in last note; Da Costa *v.* Edmunds, 4 Camp. 143, per Lord Ellenborough.

[4] Blackett *v.* Roy. Ex. Ass. Co., 2 Cr. & J. 249, 250, per Lord Lyndhurst; Crofts *v.* Marshall, 7 C. & P. 597, 607, per Lord Denman. See also Phillips *v.* Briard, 25 L. J., Ex., 233; 1 H. & N. 21, S. C.

[5] Wigram on Wills, 11, 12, cited ante, § 1034, note 4.

part of the writing itself.[1] It seems, too, that, since the Act of Parliament passed for altering the style, the words, Lady Day and Michaelmas, if used in a lease, have respectively been presumed to mean the 25th of March and the 29th of September; and no parol evidence of the custom of the country is admissible to show that the parties used these words with reference to the old style.[2] In several cases, however, of parol demises, such evidence has been received;[3] but whether the distinction hitherto drawn between a letting by deed, and a letting by parol, would now be sustained, may admit of a serious doubt.

§ 1065.[4] On a warranty of prime singed bacon, evidence of a practice in the trade, to receive bacon slightly tainted as prime singed, has been rejected.[5] So, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible.[6] So, parol evidence has been rejected, when tendered for the purpose of proving that the words "glass ware in casks," contained in the memorandum of excepted articles in a fire policy, meant, according to the understanding of insurers and insured, such ware in open casks only.[7] So, where a bill of lading contained the usual clause, "the dangers of the sea only excepted," the Court held, that the shipowners could not rely on an established custom in the trade, that persons in their position should only be liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured

[1] Smith v. Wilson, 3 B. & Ad. 731—734, per Lord Tenterden and Parke, J.; Hockin v. Cooke, 4 T. R. 314; Att.-Gen. v. Cart Plate Glass Co., 1 Anstr. 39; Noble v. Durell, 3 T. R. 271; Sleght v. Rhinelander, 1 Johns. 192; Frith v. Barker, 2 Johns. 335; Stoever v. Whitman, 6 Binn. 417; Henry v. Risk, 1 Dall. 465.

[2] Doe v. Lea, 11 East, 312.

[3] Doe v. Benson, 4 B. & A. 588; Furley v. Wood, 1 Esp. 198, per Lord Kenyon.

[4] Gr. Ev., § 292, in part.

[5] Yates v. Pym, 6 Taunt. 446. See also Malcomson v. Morton, 11 Ir. Law R. 230.

[6] Blackett v. Roy. Ex. Ass. Co., 2 Cr. & J. 244. See Hall v. Janson, 4 E. & B. 500.

[7] Bend v. Georgia Ins. Co., Sup. Ct., N. York, 1842.

and stowed.[1] So, also, where some linseed was bought to be delivered at Hull, and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," evidence to show that this stipulation was intended by the parties for the benefit, not of the seller, but of the buyer, who had the option of accepting the seed during any portion of the fourteen days, has been rejected.[2]

§ 1066. Where goods had been sold through a London broker under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that *bills* meant *approved* bills, and that the vendor had the option of rejecting any bill of which he disapproved;[3] and, although the same learned judge, in a subsequent stage of the case, admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract, within a reasonable time after the name of the purchaser had been communicated to them,— serious doubts may be entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words, to be incorporated in it.[4]

§ 1067. Parol evidence of usage or custom is not confined to cases where the written instrument is expressed in ambiguous technical language; for[5] it is certainly sometimes admissible "*to annex incidents*," as it is termed,—that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, though a bill of exchange or promissory note is silent as to any days of grace,[6] parol evidence of the known and established usage of the country or place

[1] The schooner Reeside, 2 Sumn. 567.

[2] Sotilichos *v.* Kemp, 3 Ex. R. 105.

[3] Hodgson *v.* Davies, 2 Camp. 532, approved of by Lord Denman in Trueman *v.* Loder, 11 A. & E. 599.

[4] Hodgson *v.* Davies, 2 Camp. 531, questioned by Lord Denman in Trueman *v.* Loder, 11 A. & E. 599. [5] Gr. Ev., § 294, as to four lines.

[6] The time is surely come for abolishing this useless and inconvenient "incident."

where the bill or note is payable, is admissible to show on what day the grace expired.[1] So, it may be proved by parol, that it is

[1] Renner *v.* Bank of Columbia, 9 Wheat. 581, where the decisions on this point are reviewed by Thompson, J. The following table, copied from Mr. Chitty's large work on Bills of Exchange, p. 374—376, may be found of practical use; though too much reliance should not be placed on its entire accuracy:—

Altona	Sundays and holidays included, and bills falling due on a Sunday or holiday must be paid, or in default thereof protested, on the day previous	12 days.
America		3 days.
Amsterdam	Abolished since the Code Napoleon	none.
Antwerp	Abolished by the Code Napoleon	none.
Berlin	When bills including them do not fall due on a Sunday or holiday, in which case they must be paid or protested the day previous	3 days.
Brazil	Rio de Janeiro, Bahia, including Sundays, &c., as in the last case	15 days.
England, Scotland, Wales, and Ireland		3 days.
France	Abolished by the Code Napoleon, Livre i., tit. 8, § 5, pl. 135; 1 Pardess. 189. 10 days were formerly allowed; Poth. pl. 14, 15	none.
Frankfort-on-the-Maine	Except on bills drawn at sight, Sundays and holidays not included	4 days.
Genoa	Abolished by the Code Napoleon	none.
Hamburgh	Same as Altona	12 days.
Ireland		3 days.
Leghorn		none.
Lisbon and Oporto	15 days on local, and 6 on foreign bills; but if not previously accepted, must be paid on the days they fall due . . . 6 days, or	15 days.
Naples	Abolished by the Code Napoleon	none.
Palermo		none.
Petersburg	Bills drawn after date are entitled to 10 days' grace, those drawn at sight to only 3 days, and those at any number of days after sight none whatever. But bills received and presented after they are due, are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, as also the day when the bill falls due, on which days they cannot be protested for non-payment, but on the morning of the last day of grace payment must be demanded, and if not complied with, the bill must be protested before sunset	10 days, 3, &c.

the custom for persons employed in particular trades, under general contracts of hiring and service, to have certain holidays in the year, and the Sundays to themselves.[1] So, it may be shown by parol, that a heriot is due by custom on the death of a tenant for life, though it be not expressed in the lease.[2] So, a lessee by deed may show, that, by the custom of the country, he is entitled to an away-going crop, though no such right be reserved in the deed.[3] So, a publican, holding premises under a written agreement, which reserved a weekly rent, but was otherwise silent as to the period of the tenancy, has been allowed in Ireland to prove a custom among licensed victuallers, according to which, a tenant paying in advance the yearly victualler's licence, is deemed to

Rio de Janeiro, Bahia, and other parts of Brazil	Days of grace on foreign bills are 15, including holidays and Sundays, and if due on any such day, must be paid, or in default thereof protested, on the previous day	15 days.
Rotterdam . .	Abolished by the Code Napoleon . . .	none.
Scotland .	. . . .	3 days.
Spain . .	Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland bills; at Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor any bills, unless accepted prior to maturity	14 days, but vary.
Trieste . .	3 days on bills drawn after date, or any term after sight not less than 7 days, or payable on a particular day; but bills presented after maturity must be paid within 24 hours. Sundays and holidays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the bill protested, on the first following open day .	3 days.
Venice . .	6 days, in which Sundays, holidays, and the days when the bank is shut, are not included	6 days.
Vienna . .	Same as Trieste	3 days.
Wales .	. . . .	3 days.

[1] R. v. Stoke-upon-Trent, 5 Q. B. 303. [2] White v. Sayer, Palm. 211.

[3] Wigglesworth v. Dallison, 1 Doug. 201; 1 Bligh, 287, S. C.; Senior v. Armitage, Holt's N. P. R. 197, explained by Parke, B., in 1 M. & W. 476; Hutton v. Warren, 1 M. & W. 466; Tyr. & Gr. 646, S. C.

have a yearly tenure, though the rent be payable weekly.[1] Again, in an action for the price of tobacco, evidence will be admissible to show, that, by the usage of the trade, all sales of tobacco are by sample, although this term be not expressed in the bought and sold notes.[2] In another case, where a quantity of linseed oil had been sold through London brokers by bought and sold notes, and the name of the purchaser was not disclosed in the bought note, evidence was received of a usage of trade in the City, by which every buying broker, who did not, at the date of the bargain, name his principal, rendered himself liable to be treated by the vendor as the purchaser.[3] So, where a horse had been sold by private contract at a repository with a written warranty of soundness, and the purchaser afterwards brought an action against the seller, the horse turning out to be unsound, the defendant was permitted to show that, by one of the printed regulations hung up in the repository, warranties were only to remain in force till twelve o'clock on the day after the sale; and then, upon further proof, that the plaintiff was aware of this regulation, and yet made no complaint within the specified time, a nonsuit was directed to be entered.[4]

§ 1068. This rule of annexing incidents by parol, which, time out of mind, has been adopted in explanation of mercantile proceedings, and is now generally applied to contracts respecting any transaction wherein known usages have prevailed, rests on the presumption, that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject-matter.[5] But here it must be borne in mind that "incidents" are frequently

[1] Lundy *v.* Reilly, 30 Law Times, 223, in Ir. Ex.

[2] Syers *v.* Jonas, 2 Ex. R. 111. See also Brown *v.* Byrne, 3 E. & B. 703; Cuthbert *v.* Cumming, 10 Ex. R. 809; aff. in Ex. Ch., 11 Ex. R. 405.

[3] Humfrey *v.* Dale, 26 L. J., Q. B., 137; 7 E. & B. 266, S. C.

[4] Bywater *v.* Richardson, 1 A. & E. 508; 3 N. & M. 748, S. C. See Smart *v.* Hyde, 8 M. & W. 723; and Foster *v.* Mentor Life Assurance Co., 3 E. & B. 48.

[5] Hutton *v.* Warren, 1 M. & W. 475, per Parke, B.; Gibson *v.* Small, 4 H. of L. Cas. 397, per id.

"annexed" to contracts, and conditions implied, not only by the usage or custom of trade, which is always a matter of evidence, but by the law-merchant, which is judicially noticed without proof,[1] and by the common law.[2] This doctrine of legal implication is sufficiently abstruse, and the soundest lawyers are often at fault, when called upon to apply it to the varying transactions of life. On some matters, however, of frequent occurrence, the law has been settled by judicial decisions.

§ 1069. For instance, it is now an undoubted principle of *marine insurance* that in every voyage-policy, whether on a ship or on goods, or on freight, or on salvage,[3] a warranty of sea-worthiness at the commencement of the risk is implied, that is, the law annexes an incident in the shape of a condition, either that the ship should be sea-worthy at the commencement of the voyage, or in port when preparing for it, or that she had been sea-worthy when the voyage commenced, if the insurance is on a vessel already at sea. So, other conditions are equally implied; as not to deviate from the usual course of the voyage,—to commence it in a reasonable time,—to disclose all material circumstances; and the non-performance of these conditions avoids the policy, whether it arises from fraudulent motives or not.[4] But the law of England implies no warranty that the vessel shall continue sea-worthy after the voyage has commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament; none on an insurance for one voyage out and home, that the ship shall be sea-worthy on the return voyage; although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom imposed

[1] Ante, § 5.
[2] Gibson v. Small, 4 H. of L. Cas. 396, 397, per Parke, B.
[3] Knill v. Hooper, 2 H. & N. 277.
[4] Gibson v. Small, 4 H. of L. Cas. 397, 398; 16 Q. B. 158, S. C., in Ex. Ch., per Parke, B.

upon underwriters in America.[1] Neither, in the case of a time policy, does the law imply any warranty or condition that the ship should be sea-worthy either at the date of the insurance,[2] or at the commencement of the voyage during which the policy attaches;[3] and this, too, as it would seem, although the ship should be an outward-bound vessel, lying in a British port where the owner actually resides.[4]

§ 1070. In contracts for the *sale* of *estates*, whether freehold or leasehold, the law, in the absence of an express stipulation to the contrary, implies an undertaking on the part of the vendor that he will make out a good title,[5] and an undertaking on the part of the vendee, that, if the title prove defective, the damages to which he shall be entitled shall be limited to the expenses actually incurred in the investigation, and shall be merely nominal for the loss of the bargain.[6] If, indeed, it should turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever,[7] then the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts.

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[1] Gibson *v.* Small, 4 H. of L. Cas. 398, per Parke, B.

[2] Gibson *v.* Small, 4 H. of L. Cas. 353; Small *v.* Gibson, 16 Q. B. 128, S. C., in Ex. Ch.

[3] Gibson *v.* Small, 4 H. of L. Cas. 407, per Parke, B., 422, 423, per Ld. Campbell; Jenkins *v.* Heycock, 8 Moo. P. C. R. 351; Michael *v.* Tredwin, 17 Com. B. 551.

[4] Thompson *v.* Hopper, 25 L. J., Q. B., 240; 6 E. & B. 172, S. C., Erle, J., diss.; Fawcus *v.* Sarsfield, 25 L. J., Q. B., 249; 6 E. & B. 192, S. C., Erle, J., diss.

[5] Souter *v.* Drake, 5 B. & Ad. 992; 3 N. & M. 40, S. C.; Doe *v.* Stanion, 1 M. & W. 695, 701, per Parke, B.; Hall *v.* Betty, 4 M. & Gr. 410; 5 Scott's N. R. 508, S. C.; Worthington *v.* Warrington, 5 Com. B. 635. These cases overrule George *v.* Pritchard, Ry. & Moo. 417. See Kintrea *v.* Perston, 1 H. & N. 357.

[6] Flureau *v.* Thornhill, 2 W. Bl. 1078; Walker *v.* Moore, 10 B. & C. 416; Robinson *v.* Harman, 1 Ex. R. 855, per Parke, B.; Worthington *v.* Warrington, 8 Com. B. 134; Pounsett *v.* Fuller, 17 Com. B. 660.

[7] Hopkins *v.* Grazebrook, 6 B. & C. 31; 9 D. & R. 22, S. C.; Robinson *v.* Harman, 1 Ex. R. 850.

§ 1071. In every *demise* of real property, whether by deed or parol, the law annexes conditions that the lessor will give possession of the premises to the lessee,[1] and that the lessee shall have quiet enjoyment of them,[2] and shall not be evicted during the term;[3] but no undertaking for good title is implied by law from a demise by parol;[4] nor is any warranty implied that the subject-matter of a lease,—whether it consist of a house or of land,—shall, either at the commencement, or during the continuance, of the term be in a proper state for habitation or cultivation, or that, in other respects, it shall be reasonably fit for the purpose for which it is taken.[5] Neither does the law imply, from the relation of landlord and tenant, any obligation on the part of the landlord to do substantial repairs on notice;[6] and even where the landlord is bound by special agreement to keep the premises in repair during the tenancy, there is no implied condition that the tenant may quit if the repairs be not done.[7] In the case, however, of letting a *ready furnished* house, the law, as it would seem,[8] imposes an obligation upon the landlord to let the premises in a reasonably habitable state; and therefore, if the furniture be insufficient in quantity, or defective in quality, if the beds swarm with vermin, or the house be infected with contagion, the tenant may quit without notice, unless, perhaps, in the event of his having had an opportunity of inspecting the premises by himself or his agent before entering on the occupation.[9]

[1] Coe *v.* Clay, 5 Bing. 440; Jinks *v.* Edwards, 11 Ex. R. 775; Drury *v.* Macnamara, 5 E. & B. 612.

[2] Bandy *v.* Cartwright, 8 Ex. R. 913.

[3] Per Parke, B., in Sutton *v.* Temple, 12 M. & W. 64; and in Hart *v.* Windsor, id. 85.

[4] Bandy *v.* Cartwright, 8 Ex. R. 913; overruling contrary dicta by Parke, B., in De Medina *v.* Norman, 9 M. & W. 827; and Sutton *v.* Temple, 12 M. & W. 64.

[5] Sutton *v.* Temple, 12 M. & W. 52; Hart *v.* Windsor, id. 68. These cases overrule Edwards *v.* Etherington, Ry. & M. 268; 7 D. & R. 117, S. C.; Collins *v.* Barrow, 1 M. & Rob. 112; Salisbury *v.* Marshall, 4 C. & P. 65.

[6] Gott *v.* Gandy, 2 E. & B. 845.

[7] Surplice *v.* Farnsworth, 7 M. & Gr. 576.

[8] Smith *v.* Marrable, 11 M. & W. 5.

[9] Id.; commented on by Lord Abinger, in Sutton *v.* Temple, 12 M. & W. 60, 61.

§ 1072. On the sale of a *specific ascertained chattel*, the law of England,—unlike the Roman,[1] the French,[2] the Scotch,[3] and, in part,[5] the American law,[4]—does not annex to the contract any implied warranty of *title*,[5] but a warranty may be inferred in such case either from the usage of trade, or from the declaration or conduct of the vendor being such as to lead to the conclusion that he sold the property as "his own," or from the fact of the articles being bought in a shop professedly carried on for the sale of goods.[6] With respect to *executory* contracts of purchase and sale, where the subject is *unascertained*, and is afterwards to be conveyed, the law would probably imply that both parties meant that a good title to that subject should be transferred, in the same manner as it would imply, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery; and if he did accept, and the goods were recovered from him, he would not be bound to pay for them, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed.[7]

§ 1073. Upon a sale of merchandise, which the buyer has no opportunity of inspecting, the law implies a condition that the article shall fairly and reasonably answer the description in the contract;[8] but where *goods* are *sold* under circumstances which afford the purchaser an opportunity of inspecting either the bulk or the sample, the maxim of *caveat emptor* is generally applicable,

[1] See Domat, bk. 1, tit. 2, § 2, art. 3.

[2] Code Civil, ch. 4, § 1, art. 1603.

[3] Bell on Sale, 94.

[4] Defreeze *v.* Trumper, 1 Johns. R. 274; Rew *v.* Barber, 3 Cowen, 272; Broom's Max. 628.

[5] Morley *v.* Attenborough, 3 Ex. R. 500, 510, per Parke, B.; Ormrod *v.* Huth, 14 M. & W. 664, per Tindal, C. J.; Hall *v.* Condor, 2 Com. B., N. S., 40. See Sims *v.* Marryat, 17 Q. B. 291, per Lord Campbell.

[6] Morley *v.* Attenborough, 3 Ex. R. 511—513, per Parke, B.

[7] Id. 509, 510, per Parke, B. It is still an undecided point whether, on the sale of a *copyright*, the law would imply a warranty of title. See Sims *v.* Marryat, 17 Q. B. 281.

[8] Wieler *v.* Schilizzi, 17 Com. B. 619.

and the law does not imply any warranty[1] either as to their merchantable quality,[2] or their value, or their fitness for the purpose for which they were bought.[3] This doctrine even extends to the sale of food for the use of man,[4] unless the vendor be a butcher, baker, vintner, or other common victualler, in which case he will be presumed to have warranted that the provisions supplied by him were sound and wholesome.[5] Again, where a known ascertained chattel is specifically ordered by the buyer, the manufacturer who executes the order does not thereby impliedly warrant that the article supplied by him shall be fit for the special purpose to which it is intended to be applied.[6] But where the purchaser, instead of depending on his own judgment, may fairly be supposed to rely on the skill and knowledge of the vendor, there the law implies a warranty that the chattel furnished shall be reasonably fit for the purpose for which it is known to be ordered;[7] and this doctrine will apply in an especial manner to cases, where the articles are supplied directly by the manufacturer.[8]

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[1] The Scotch law on this subject is now embodied in § 5 of 19 & 20 Vict., c. 60, which enacts, that "where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."

[2] Independent, however, of the law of implied warranty, a party is not bound to accept and pay for chattels, unless they really answer the *description* of the articles which the vendor professed to sell, and the purchaser intended to buy. Gompertz *v.* Bartlett, 2 E. & B. 849; Young *v.* Cole, 3 Bing. N. C. 724; 4 Scott, 489, S. C.; Hall *v.* Conder, 2 Com. B., N. S., 41.

[3] Parkinson *v.* Lee, 2 East, 314; recognised by Parke, B., in Sutton *v.* Temple, 12 M. & W. 64; and explained by Tindal, C. J., in Shepherd *v.* Pybus, 3 M. & Gr. 880.

[4] Burnby *v.* Bollett, 16 M. & W. 644; Le Neuville *v.* Nourse, 3 Camp. 351.

[5] Burnby *v.* Bollett, 16 M. & W. 649, 654, 655, per Parke, B.

[6] Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288; recognised in Parsons *v.* Sexton, 4 Com. B. 908; Prideaux *v.* Bunnett, 1 Com. B., N. S., 613; Hall *v.* Conder, 2 Com. B., N. S., 41.

[7] Brown *v.* Edgington, 2 M. & Gr. 279, 290; 2 Scott, N. R. 496, S. C.; recognised in Sutton *v.* Temple, 12 M. & W. 64.

[8] Shepherd *v.* Pybus, 3 M. & Gr. 868; 4 Scott, N. R. 434, S. C.; Sutton *v.* Temple, 12 M. & W. 64, per Parke, B.

§ 1073 A. The legal effect of contracts for the sale of patents has recently been the subject of much discussion in Westminster Hall; but it is now determined that the law implies no warranty in such a contract either that the vendor was the true and first inventor within the Statute of James, or that the invention was either useful or new.[1]

§ 1074. From the ordinary relation of *master* and *servant*, no contract, and therefore no duty, can be implied on the part of the master to protect the servant against any injury arising either from the negligence of another servant, or from the defective condition of the master's property,[2] unless such condition has been caused by the personal negligence of the master.[3] A ship-owner, therefore, unless guilty of fraudulent concealment, will not be responsible for any illness or other damage caused to a seaman in consequence of the vessel going to sea in an unseaworthy state.[4]

§ 1074 A. When a man makes a contract as agent for another person, the law implies a warranty on his part that he has authority to bind his principal; and if it turns out that he really has no such authority, he may be sued for the damages necessarily occasioned by this breach of warranty, though he may have acted under the bonâ fide belief that he was authorised as agent to make the contract.[5]

§ 1075. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be *not repugnant to or inconsistent with* the contract; for, otherwise, it would not go to interpret and explain, but to contradict, what

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[1] Hall v. Conder, 2 Com. B., N. S., 22 ; Smith v. Neale, id. 67.

[2] Seymour v. Maddox, 16 Q. B. 326 ; Priestley v. Fowler, 3 M. & W. 1 ; Hutchinson v. The York, Newcastle, & Berwick Rail. Co., 5 Ex. R. 343 ; Wigmore v. Jay, id. 354 ; Dynen v. Leach, 26 L. J., Ex., 221.

[3] Roberts v. Smith, 26 L. J., Ex., 319, in Ex. Ch.

[4] Couch v. Steel, 3 E. & B. 402, overruling a dictum of Parke, B., in Gibson v. Small, 4 H. of L. Cas. 404.

[5] Collen v. Wright, 26 L. J., Q. B., 147 ; 7 E. & B. 301, S. C. ; 30 Law Times, 209, S. C., in Ex. Ch. ; Randell v. Trimen, 18 Com. B. 786 ; Simons v. Patchett, 26 L. J., Q. B., 195.

is written.[1] In order to establish an inconsistency between the written agreement and the custom, it is not necessary that the former should *in express terms* exclude the latter; but if it can be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by the custom, no evidence respecting it can be received.[2] For instance, suppose the custom of the country should require the tenant to plough, sow, and manure a certain portion of the demised land in the last year, and should entitle him, on quitting, to receive from the landlord a reasonable compensation for his labour, seeds, and manure; evidence of such a custom would be rejected, had the tenant covenanted to plough, sow, and manure, in accordance with the custom, he being paid on quitting for the *ploughing;* because here the principle *expressum facit cessare tacitum* would apply, and the language of the lease would be deemed equivalent to a stipulation, that the lessor should pay for the ploughing, and *no more.*[3] So, where some wool had been sold upon the terms that it should "be paid for by cash in one month, less five per cent. discount," the Court rejected evidence which was tendered to show, that, by the usage of the trade, vendors were not bound under similar contracts to deliver the wool without payment. The contract standing alone clearly imported a sale upon credit for a month, and that the purchaser should be entitled to a delivery of the wool within the month without payment of the price; and the evidence sought to be introduced would, consequently, have had the effect of annexing an incident to the contract, which was at least impliedly inconsistent with its terms.[4]

§ 1076. In order to constitute such a custom or usage, as will be admissible in evidence to explain the terms of a written instru-

[1] Holding *v.* Pigott, 7 Bing. 465, 474; 5 M. & P. 427, S. C.; Clarke *v.* Roystone, 13 M. & W. 752; Yeats *v.* Pinn, Holt, N. P. R. 95; nom. Yates *v.* Pym, 6 Taunt. 446, S. C.; Trueman *v.* Loder, 11 A. & E. 589; 3 P. & D. 267, S. C.; Muncey *v.* Dennis, 1 H. & N. 216.

[2] Hutton *v.* Warren, 1 M. & W. 477, per Parke, B. See Clarke *v.* Roystone, 13 M. & W. 752.

[3] 1 M. & W. 477, 478; Webb *v.* Plummer, 2 B. & A. 746.

[4] Spartali *v.* Benecke, 10 Com. B. 212. See Godts *v.* Rose, 17 Com. B. 229.

ment, it is not necessary that it should have been *immemorial*, or even established for a considerable period, or *uniform*, or capable of being defined with precision and accuracy. Thus, "the custom of the country" with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie;[1] and the general usage of trade may be imported into a contract, though proof has been given of exceptions to such usage.[2] So, although a particular branch of trade has been only established for a year or two, parties connected with that trade will be presumed to have contracted, with reference to the usages generally adopted since its existence.[3] But in all these cases it is the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence: and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.[4]

§ 1077. Whenever evidence of usage is adduced, whether it be for the purpose of explaining the technical language of an instrument, or of annexing incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between the parties.[5] Indeed, if any reason exists for believing that the opposite party will rely upon usage, the evidence on these points may be given by way of *anticipation*. For instance, where the owner of goods brought an action of assumpsit against a carrier by sea, for non-delivery of the goods to him at the port of London, and the defendant pleaded that he had delivered them at that port,

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[1] Legh *v.* Hewitt, 4 East, 154, 159, per Lord Ellenborough; Dalby *v.* Hirst, 1 B. & B. 224, 227, 228; 3 Moore, 536, S. C. See ante, § 299.

[2] Vallance *v.* Dewar, 1 Camp. 508, per Lord Ellenborough.

[3] Noble *v.* Kennoway, 2 Doug. 513, per Lord Mansfield; Robertson *v.* Jackson, 2 Com. B. 412.

[4] Lewis *v.* Marshall, 7 M. & Gr. 744, 745, per Tindal, C. J.

[5] Bourne *v.* Gatliffe, 3 M. & Gr. 684, per Alderson, B.; Bottomley *v.* Forbes, 5 Bing. N. C. 127, 128, per Tindal, C. J.

—it was held first by the Court of Exchequer Chamber,[1] and then by the House of Lords,[2] that the plaintiff might prove former dealings between himself and the defendant respecting the carriage of other goods from the defendant's London wharf to the plaintiff's place of business; as such evidence was offered, not for the purpose of extending or narrowing the contract, or in any way changing it, but with the sole view of meeting a case, which might be made on the other side to establish a custom of delivery at a wharf. The fact that the evidence consisted of instances of individual contracts, might be open to observation, but the evidence could not be rejected on that ground;[3] and Lord Brougham observed, "A party may properly in this way anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out."[4]

§ 1078. Before quitting this subject, it may be observed, that much injustice is frequently occasioned by the lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it which was never contemplated by the parties themselves, and which is utterly at variance with their real intentions. In this view some of the highest legal authorities both in England and America concur. In Hutton *v.* Warren,[5] though the judges of the Court of Exchequer yielded, as they were bound to do, to the precedents cited, they threw out a pretty clear intimation of their opinion, that, where formal agreements had been entered into, and especially instruments under seal, the relaxation of the strictness of the common law, which arose from the admission of evidence of usage, was unwise and unjust; and the same opinion has been expressed more than once by the Court of Queen's Bench.[6]

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[1] Bourne *v.* Gatliffe, 3 M. & Gr. 643, 689; 3 Scott, N. R. 1, S. C.
[2] Id.; 11 Cl. & Fin. 45, 49, 69—71; 7 M. & Gr. 850, 865, 866, S. C.
[3] 11 Cl. & Fin. 70, per Lord Lyndhurst, C.; 7 M. & Gr. 865, S. C.
[4] 11 Cl. & Fin. 71; 7 M. & Gr. 866, S. C.
[5] 1 M. & W. 475. See also Anderson *v.* Pitcher, 2 B. & P. 168, per Lord Eldon.
[6] Johnston *v.* Usborne, 11 A. & E. 557; Trueman *v.* Loder, id. 597.

§ 1079. "If," said Lord Denman, in pronouncing the opinion of the Court on one occasion, "a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom."[1]

§ 1080. The late Mr. Justice Story has expressed the same sentiments; and as all the observations of that great and good judge deserve especial respect, no apology seems necessary for inserting the following passage from one of his judgments:[2]—"I[3] own myself," said he, "no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages

[1] Trueman v. Loder, 11 A. & E. 597, 598.

[2] The Schooner Reeside, 2 Sumn. 567.

[3] Gr. Ev., § 292, n.

and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find, that of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and à fortiori, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties."

§ 1081. Besides the evidence of usage, strictly so called, it seems that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of making the agreement, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms.[1] On one or

[1] Sweet v. Lee, 3 M. & Gr. 452, 460.

two occasions, even conversations between the parties when the contract was being made, have been received, in proof of the sense which they attached to the ambiguous expressions.[1] The principle, however, of these cases is not very clear, and no great weight should, in prudence, be attached to them.[2]

§ 1082. Passing now to the consideration of the second description of evidence, which is admissible in explanation of written instruments, it may be laid down as a broad and distinct rule of law, that *extrinsic evidence* of every *material fact*, which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers, must of necessity be received.[3] Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.[4] With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument.[5] In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed by the designation of Blackacre, parol evidence must

[1] Birch *v.* Depeyster, 1 Stark. R. 210, per Gibbs, C. J.; Gray *v.* Harper, 1 Story R. 574; Selden *v.* Williams, 9 Watts, 9.

[2] See Smith *v.* Jeffryes, 15 M. & W. 561.

[3] Doe *v.* Hiscocks, 5 M. & W. 367, 368, per Lord Abinger; Shore *v.* Wilson, 9 Cl. & Fin. 556, per Parke, B.; Wigram on Wills, 51; Doe *v.* Martin, 4 B. & Ad. 771, 785, 786, per Parke, J.; 1 N. & M. 512, S. C.; R. *v.* Wooldale, 6 Q. B. 549, 565, per Coleridge, J.

[4] Shore *v.* Wilson, 9 Cl. & Fin. 556, per Parke, B.; Doe *v.* Martin, 1 N. & M. 524, per id.; Guy *v.* Sharpe, 1 Myl. & K. 602, per Lord Brougham; Wigram on Wills, 76, 77.

[5] Sweet *v.* Lee, 3 M. & Gr. 466, per Tindal, C. J.; Att.-Gen. *v.* Drummond, 1 Dru. & War. 367, per Sugden, C.; Drummond *v.* Att.-Gen., 2 H. of L. Cas. 862, per Lord Brougham; Att.-Gen. *v.* Earl of Powis, 1 Kay, 207, per Wood, V. C.; King's Coll. Hospital *v.* Wheildon, 18 Beav. 30; Blundell *v.* Gladstone, 1 Phill. 282, 283; Simpson *v.* Margitson, 11 Q. B. 32, per Lord Denman.

be admitted to show what property is known by that name;[1] and if a testator devise a house purchased of A., or a farm in the occupation of B., it must be shown by extrinsic evidence, what house was purchased of A., or what farm was in B.'s occupation, before it can be shown what is devised.[2]

§ 1083. Again, to put instances somewhat more complex, if the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings, or circumstances; or if the terms be vague and general, or have divers meanings; parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, if the Court has to determine whether a bequest of *stock* is specific or pecuniary, it will not only look to the context of the will, and the terms of the gift, as compared with those of the other bequests, but it will also receive evidence of the state of the testator's funded property.[3] So, where a man had assigned all his household goods, and the deed stated that the particulars were set forth in an inventory annexed, the fact of no inventory being found was held not to invalidate the deed, but extrinsic evidence was admitted for the purpose of identifying the chattels.[4] So, where a testator had directed in his will that all moneys which he had advanced or might advance to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, the Court, in addition to other extrinsic evidence of the nature and amount of the advances, admitted an unattested document, which, after the date of the will, had been drawn up by the testator, with the apparent view of furnishing a guide to his trustees on the subject.[5]

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[1] Ricketts v. Turquand, 1 H. of L. Cas. 472.

[2] Sanford v. Raikes, 1 Mer. 653, per Sir W. Grant; Clayton v. Lord Nugent, 13 M. & W. 207, per Rolfe, B.

[3] Att.-Gen. v. Grote, 2 Russ. & M. 699, per Lord Eldon; Wigram on Wills, 201, 202, S. C.; Boys v. Williams, 2 Russ. & M. 689, per Lord Brougham; Horwood v. Griffith, 23 L. J., Ch., 465; 4 De Gex, M. & Gord. 700, S. C.

[4] England v. Downs, 2 Beav. 523, 536.

[5] Whateley v. Spooner, 3 Kay & J. 542.

§ 1083 A. In the the case of Goblet v. Beechey,[1] the controversy turned on the word "mod," as used in the following codicil of the distinguished sculptor Nollekens. "In case of my death, all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The plaintiff contended that the word meant models; the defendant, who was the executor, urged that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand it was proved, that the legatee had been in the testator's service for thirty years, and was highly esteemed by him as one of his best workmen; and statuaries were called to prove that no such tools were known as modelling tools for carving, but that the word "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling value; and he further gave in evidence, that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. Reading the codicil by the light of this extrinsic evidence, Vice-Chancellor Shadwell came to a decision that the word in question sufficiently described the testator's models; and although this decree was subsequently reversed by Lord Brougham, the reversal rested, not on the inadmissibility of any portion of the evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much obscurity to justify its operating as a revocation of the prior bequest.[2] In another recent case,[3] a testator had bequeathed to his two children the several sums of i.x.x. and o.x.x. These marks standing alone were obviously unintelligible; but the Court allowed them to be explained by extrinsic evidence, showing that the deceased, when alive, had, in his business of a jeweller, used the symbols as denoting respectively 100*l.* and 200*l.*

[1] 3 Sim. 24; Wigram on Wills, 185, S. C.

[2] 2 Russ. & My. 624.

[3] Kell v. Charmer, 23 Beav. 195.

§ 1084. In many other cases of testamentary dispositions, one construction would be given to particular words, if children were living at the time the will was executed; and another construction, if no child was alive at that period; and here it is obvious, that unless the Court were first made acquainted with the circumstances surrounding the testator, it could not with safety undertake to construe the will.[1] So, if a man were to make a settlement for his children, which was involved in some ambiguity, it might be impossible for the Court to solve the doubt, until evidence had been adduced respecting the state of the family of the settlor, and the circumstances in which he was placed in relation to the property dealt with.[2] So, where an estate, a house, a mill, a factory, or a farm, has been conveyed or devised *eo nomine*, and the question is as to what was part and parcel thereof, and so passed by the deed or will, parol evidence showing the situation and limits of the property, the manner in which it was acquired, or occupied, and the like, will be always admissible.[3] So, if the language of a guarantee leaves it doubtful whether the consideration mentioned therein be a *past* or *present* consideration, and consequently whether the instrument be invalid or valid, parol evidence of the circumstances under which it was given will be received to explain the ambiguity;[4] and perhaps, in such a case, the Court, without the aid of any extrinsic proof, would now in the first instance adopt that construction which would support the validity of the instrument, and would cast upon the party objecting to the guarantee the burthen of producing evidence to show that it was void.[5]

[1] Per Sugden, C., in Att.-Gen. *v.* Drummond, 1 Dru. & War. 367. [2] Id.

[3] Doe *v.* Martin, 4 B. & Ad. 785, per Parke, J.; Doe *v.* Burt, 1 T. R. 704, per Buller, J.; Webb *v.* Byng, 1 Kay & J. 580; Doe *v.* E. of Jersey, 1 B. & A. 550; S. C. in Dom. Proc., 3 B. & C. 870; Okeden *v.* Clifden, 2 Russ. 309; Ropps *v.* Barker, 4 Pick. 239; Farrar *v.* Stackpole, 6 Greenl. 154.

[4] Goldshede *v.* Swan, 1 Ex. R. 154, and cases there cited; Edwards *v.* Jevons, 8 Com. B. 436; Colbourn *v.* Dawson, 10 Com. B. 765; Bainbridge *v.* Wade, 16 Q. B. 89.

[5] Steele *v.* Hoe, 14 Q. B. 431; Brown *v.* Batchelor, 1 H. & N. 255. See Mare *v.* Charles, 5 E. & B. 978; and also 19 & 20 Vict., c. 97, § 3, cited ante, § 941.

§ 1085. It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the Courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it. Thus, where certain premises were leased, including a yard described by the metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show, that at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease.[1] So, where a testator had devised, in 1804, "all his lands in the parish of Doynton" to his daughter, and it appeared that he had a farm, which at that date was generally reputed to be wholly in Doynton, but which subsequently turned out to be partly in another parish, the Court of Exchequer rightly held that the entire farm passed under the will.[2] So, where a fine had been levied for twenty acres of land and twelve messuages in Chelsea, evidence was admitted to show, that, though the conusor's estate at Chelsea was under twenty acres, he had nineteen houses on it; and as, read in connexion with these facts, the language of the fine was ambiguous, further proof was received as to what particular part of the property was intended to be included in it.[3] Again, an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and a younger illegitimate child, named Elizabeth. Thus, two persons only were in existence, who correctly answered the description in the devise; yet still Elizabeth, the illegitimate daughter, might have been included therein, had it clearly appeared that the testator so intended. In order, however, to rebut her

[1] 2 Poth. on Obl. by Evans, 185; Doe v. Burt, 1 T. R. 701.

[2] Austee v. Nelms, 1 H. & N. 225.

[3] Doe v. Wilford, 1 C. & P. 284; Ry. & M. 88, S. C.; Denn v. Wilford, 2 C. & P. 173.

claim, extrinsic evidence was admitted, which showed that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who was born in the order stated in the will; and that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances the jury were held to have rightly decided, that the illegitimate daughter Elizabeth was not entitled to the devise in question.[1]

§ 1086. So, also, if an order of removal has been quashed generally by the Sessions, the removing parish, on the trial of an appeal against a subsequent order of removal, may show by parol evidence the state of things when the first order was quashed, and that the Sessions in quashing it intended to pronounce no decision on the merits of the settlement.[2] For although an order of Sessions quashing an order of removal is primâ facie evidence, that the pauper was not settled in the appellant parish,[3]—yet, as the decision may have proceeded, either on that ground, or on the ground that the pauper was then not chargeable, or was irremoveable, and as the language of the order of Sessions is consistent with any one of these hypotheses, it must be competent for the respondents to prove the particular ground on which the decision rested.[4]

§ 1087. But although evidence of all the circumstances, which surrounded the author of a written instrument, will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the *language* of the instrument, as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted, with the view of setting

[1] Doe *v.* Beynon, 12 A. & E. 431; 4 P. & D. 193, S. C.; Phillips *v.* Barker, 23 L. J., Ch., 44, per Stuart, V. C.; 1 Sm. & Giff. 583, S. C.

[2] R. *v.* Wick St. Lawrence, 5 B. & Ad. 526, 537; R. *v.* Wheelock, 5 B. & C. 511; R. *v.* Perranzabuloe, 3 Q. B. 400, 402, per Patteson, J.; R. *v.* Flintshire, 1 New Sess. Cas. 288; 2 Dowl. & L. 143, S. C.

[3] R. *v.* Wick St. Lawrence, 5 B. & Ad. 535, per Parke, J.; R. *v.* Yeoveley, 8 A. & E. 818, per Lord Denman.

[4] R. *v.* Wick St. Lawrence, 5 B. & Ad. 533, per Lord Denman, 535, per Parke, J.

up an intention inconsistent with the known meaning of the writing itself. For, the duty of the Court in all these cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used.[1] It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument to the established rules of law.[2]

§ 1088. In no case therefore, except, as will be presently pointed out,[3] where the description in the document would equally apply to any one of two or more subjects,[4] or where the object is to rebut an equity,[5] is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer; but, in all cases alike, the Court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show, that in fact they used it in any other sense, or had any other intention.[6]

§ 1089. For instance,[7] parol evidence has repeatedly been

[1] Doe v. Gwillim, 5 B. & Ad. 129, per Parke, J.; Doe v. Martin, 4 B. & Ad. 786, per id.; 1 N. & M. 524, S. C.; Shore v. Wilson, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 566, per Tindal, C. J.; Beaumont v. Field, 2 Chitty's R. 275, per Abbott, C. J.; Richardson v. Watson, 4 B. & Ad. 800, per Parke, J.; Rickman v. Carstairs, 5 B. & Ad. 662, 663, per Lord Denman.

[2] See Lieber's Legal and Polit. Hermeneutics, c. 1, § 8, and c. 3, §§ 2, 3; Doct. & Stu. 39, c. 24.

[3] Post, §§ 1092, 1110.

[4] Shore v. Wilson, 9 Cl. & Fin. 557, per Parke, B.

[5] See post, §§ 1100—1112.

[6] Shore v. Wilson, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 565, 566, per Tindal, C. J.

[7] For other instances, see ante, §§ 1055, 1056.

rejected, when tendered to show what persons a testator meant to include or exclude in employing the word "relations;"[1] what articles he intended to give by the word "plate,"[2] what property he thought he devised by the expression, "lands out of settlement;"[3] and the like;[4] for in all these cases, as the legal signification of the language used was plain, it mattered not in point of law what the testator intended; the sole question being, non quod voluit, sed quod dixit.[5] Indeed, if this were not the rule of law no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary the plain language of the instrument itself.[6]

§ 1090. Though declarations of intention, except in the cases before alluded to, cannot be received in evidence to explain an ambiguity in a written instrument, yet, if the instrument be an *ancient* one, and its meaning doubtful, the *acts* of the author may be given in evidence in aid of its construction. Thus, in the case of the Attorney-General *v.* Brazennoze College,[7] the House of Lords held, that proof of the application of the funds of an ancient charity by the original founder, and first trustee, was strong evidence of intention, and might be so treated by the Court in construing the grant. So, in the case of the Attorney-General *v.* Drummond,[8] Lord Chancellor Sugden, while acknow-

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[1] Goodinge *v.* Goodinge, 1 Ves. Sen. 230; Edye *v.* Salisbury, Amb. 70; Green *v.* Howard, 1 Bro. C. C. 31.

[2] Nicholls *v.* Osborn, 2 P. Wms. 419; Kelly *v.* Powlett, Amb. 605.

[3] Strode *v.* Russell, 2 Vern. 621.

[4] See other instances collected in Wigram on Wills, 88—92. See also Doe *v.* Hubbard, 15 Q. B. 227; Horwood *v.* Griffith, 23 L. J., Ch., 465; 4 De Gex, M. & Gord. 700, S. C.; Hicks *v.* Sallitt, 23 L. J., Ch., 571.

[5] Shore *v.* Wilson, 9 Cl. & Fin. 558, 559, per Parke, B.

[6] Id. 566, per Tindal, C. J.

[7] 2 Cl. & Fin. 295.

[8] 1 Dru. & War. 353, 366, 375, 376; affirmed on appeal, Drummond *v.* Att.-Gen., 2 H. of L. Cas. 837.

ledging that he could not receive evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant, held that he was clearly entitled to inquire as to what acts the founder had done in relation to the charity; and his lordship observed, that one of the most settled rules of law for the construction of ambiguities in ancient instruments was, that the Court might resort to contemporaneous usage to ascertain the meaning of the deed. "Tell me," said he, "what you have done under such a deed, and I will tell you what that deed means."[1] Lord Chief Justice Tindal, also, has declared, that, for the purpose of ascertaining the sense of an old charity grant, evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed," was certainly admissible.[2]

§ 1091. In each of the three examples given in the preceding section, the question turned on the construction of a charity grant; but as these instruments possess no peculiarity, which would warrant the adoption of a special rule of evidence with respect to them, it may be laid down as a general proposition, that all ancient instruments of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed.[3] For instance, the contemporaneous acts of occupiers of land have been admitted in evidence to explain the meaning of an ambiguous award under an old inclosure Act.[4] So,

[1] 1 Dru. & War. 368.

[2] Shore v. Wilson, 9 Cl. & Fin. 569; Att.-Gen. v. Mayor of Bristol, 2 Jac. & Walk. 121, per Lord Eldon. See 7 & 8 Vict., c. 45, § 2, cited ante, § 65.

[3] Weld v. Hornby, 7 East, 199, per Lord Ellenborough; Att.-Gen. v. Parker, 3 Atk. 577, per Lord Hardwicke; R. v. Dulwich College, 17 Q. B. 600; Att.-Gen. v. Murdoch, 1 De Gex, M. & Gord. 86. In Att.-Gen. v. St. Cross Hospital, 17 Beav. 435, 464, 465, Sir John Romilly, M. R., held, that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See Att.-Gen. v. Clapham, 4 De Gex, M. & Gord. 591.

[4] Wadley v. Bayliss, 5 Taunt. 752; recognised by Cresswell, J., in Doe v. Beviss, 7 Com. B. 511; Att.-Gen. v. Boston, 1 De Gex & Sm. 519, 527.

where the question was whether the soil, or merely the herbage, passed under the term "pastura," contained in an ancient admission as entered on the court rolls of a manor, evidence was received to show that the tenants had for a long series of years enjoyed the land itself.[1] So the by-laws of a corporation may be taken as an exposition of their charter;[2] and evidence of contemporaneous, or even of constant modern,[3] usage will be admissible, for the purpose of ascertaining the meaning and effect of an ancient grant or charter from the Crown,[4] or of any private deed, or other instrument of remote antiquity.[5] So, also, when the language of an old statute is doubtful, the maxim, optimus interpres rerum usus, will be held to apply.[6]

§ 1092. Besides general proof of all the facts and circumstances respecting the persons or things to which the instrument relates, which is undoubtedly legitimate, and often necessary, evidence, in order to enable the Court to understand the meaning and application of the language employed, the *declarations* of the writer of the instrument *will*, as before mentioned,[7] *be receivable in evidence*, in a particular class of cases; namely, *where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things.*

§ 1093. The doctrine on this subject has been lucidly explained by Lord Abinger, in an important will cause in the Exchequer.[8]

[1] Doe v. Beviss, 7 Com. B. 456; Stammers v. Dixon, 7 East, 200.

[2] Davis v. Waddington, 7 M. & Gr. 44, per Tindal, C. J.

[3] Chad v. Tilsed, 2 B. & B. 403; Doe v. Beviss, 7 Com. B. 456; Duke of Beaufort v. Mayor of Swansea, 3 Ex. R. 413; Master Pilots and Seamen of Newcastle v. Bradley, 2 E. & B. 428, n.

[4] Mayor of London v. Long, 1 Camp. 22, per Lord Ellenborough; R. v. Varlo, 1 Cowp. 248; Blankley v. Winstanley, 3 T. R. 279; Bradley v. Pilots of Newcastle, 2 E. & B. 427; Jenkins v. Harvey, 1 C. M. & R. 877; 2 C. M. & R. 393, S. C.; Brune v. Thompson, 4 Q. B. 543.

[5] Withnell v. Gartham, 6 T. R. 397, 398, per Lord Kenyon; Weld v. Hornby, 7 East, 199, per Lord Ellenborough; Duke of Beaufort v. Mayor of Swansea, 3 Ex. R. 625; Sadlier v. Biggs, 4 H. of L. Cas. 435.

[6] R. v. Scott, 3 T. R. 604, per Lord Kenyon; Sheppard v. Gosnold, Vaugh. 169; R. v. Archbp. of Canterbury, 11 Q. B. 581, per Coleridge, J.; 627, per Patteson, J.; Montrose Peer., 1 Macq. Sc. Cas., H. of L. 401.

[7] Ante, § 1088.

[8] Doe v. Hiscocks, 5 M. & W. 363.

After stating the general rule that the meaning of a will may be explained by evidence of all the circumstances surrounding the testator, his lordship goes on to observe,—"But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is *but one case*,[1] in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity;[2] for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."[3]

§ 1094. In conformity with the rule thus laid down, it has been decided, that, where a testator had devised one house "to George Gord, the son of George Gord;" another "to George Gord, the

[1] As to rebutting an equity, see post, §§ 1110—1112.
[2] See Douglas v. Fellows, 1 Kay, 114, per Wood, V. C.
[3] Doe v. Hiscocks, 5 M. & W. 368, 369.

son of John Gord;" and a third, after the expiration of certain life estates, "to George Gord, the son of Gord;" evidence of his declarations was admissible to show, that the person meant to be designated by the last description was George the son of *George* Gord.[1] So, where the devise was "to John Allen, the grandson of my brother Thomas, and I charge the same with the payment of 100*l.* to each and every the brothers and sisters of the said John Allen;" and it appeared that, at the date of the will, the testator's brother Thomas had two grandsons named John Allen, one having several brothers and sisters, and the other having one brother and one sister; the Court received evidence of the declarations of the testator, to show which grandchild was intended.[2] So, where lands were left to John Cluer, of Calcot, and two persons, father and son, were of that name, parol evidence of the testator's intention to leave them to the son, was held admissible.[3] So, where property was devised to "William Marshall, my second cousin," and it appeared that the testator had no second cousin of that name, but that he had two first cousins once removed, one named William Marshall, and the other named William John Robert Blandford Marshall, Vice-Chancellor Page Wood admitted parol evidence to dissolve this latent ambiguity.[4]

§ 1095. Where declarations of intention are receivable in evidence, the rule most consistent with modern authorities seems to be, that their admissibility does not depend upon the *time* when they were made. Contemporaneous declarations will certainly be entitled, cæteris paribus, to greater weight than those made before or after the execution; but, in point of law no distinction can be drawn between them;[5] unless the subsequent declarations, instead of relating to what the declarant

[1] Doe *v.* Needs, 2 M. & W. 129; Doe *v.* Morgan, 1 Cr. & Mee. 235.

[2] Doe *v.* Allen, 12 A. & E. 451; 4 P. & D. 220, S. C.

[3] Jones *v.* Newman, 1 W. Bl. 60; explained in Doe *v.* Hiscocks, 5 M. & W. 370.

[4] Bennett *v.* Marshall, 2 Kay & J. 740.

[5] Doe *v.* Allen, 12 A. & E. 455, per Lord Denman, as to *subsequent* declarations; Doe *v.* Hiscocks, 5 M. & W. 369, per Lord Abinger, as to *previous* declarations. See contrà Thomas *v.* Thomas, 6 T. R. 671; Strode *v.* Russell, 2 Vern. 625.

had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done, at the time of speaking.[1] Neither will the admissibility of declarations rest on the *manner* in which they were made, or on the *occasions* which called them forth; for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to the impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will of course vary materially according to the time and circumstances.[2]

§ 1096. Though declarations of intention are, as above stated, inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, this rule will not preclude mere *collateral statements* made by the author of the instrument respecting the persons or things mentioned therein. For instance, to take the case of a will, the testator may have habitually called certain persons or things by *peculiar names*, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.[3] Thus, in Blundell *v.* Gladstone,[4] where the question was, whether the second son of *Joseph* Weld, of Lulworth, was the party beneficially entitled under a devise in trust for "the second son of *Edmond* Weld, of Lulworth, Esq.," parol evidence was admitted to show that the testator had on several occasions, even after correction, called the possessor of Lulworth "Edmond."

[1] Whitaker *v.* Tatham, 7 Bing. 628.

[2] Trimmer *v.* Bayne, 7 Ves. 518, per Lord Eldon.

[3] Doe *v.* Hiscocks, 5 M. & W. 368, per Lord Abinger. See also Doe *v.* Hubbard, 15 Q. B. 227, 237, per Erle, J.

[4] 11 Sim. 467, 470; 1 Phill. 284, 285, S. C. See also Mostyn *v.* Mostyn, 3 De Gex, M. & Gord. 140, affirmed in Dom. Proc., 23 L. J., Ch., 925; 5 H. of L. Cas. 155.

§ 1097. The case of Lee *v.* Pain[1] affords a good illustration of this doctrine. There, a testatrix, by a codicil dated in 1836, had bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, 200*l.* each." These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence, that Mrs. Washbourne was the daughter of the Rev. J. Bowden, who died in 1812, and the widow of the Rev. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time no person had lived at Hammersmith answering the description in the codicil. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the two names. Under these circumstances, Vice-Chancellor Wigram decided that the claimants were entitled to their respective legacies. So, where a bequest was made to "Mrs. G.," parol evidence was admitted to show that the testator had been in the habit of calling a Mrs. Gregg, Mrs. G.[2] The case of Beaumont *v.* Fell,[3] carries this doctrine to its extreme limit. There, a legacy given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that no such person was known as Catherine Earnley, proof was received that the testator usually called the claimant Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy; and the Court, acting on this, and on other evidence of a like nature, was perhaps justified in deciding in favour of the claimant.

§ 1098. The rule, which governs the admissibility of declarations of intention, will be better understood by referring to a few cases, where evidence of such declarations has been rejected;

[1] 4 Hare, 251—253. See also R. *v.* Wooldale, 6 Q. B. 549.

[2] Abbott *v.* Massie, 3 Ves. 148, explained by Rolfe, B., in Clayton *v.* Lord Nugent, 13 M. & W. 204, 207.

[3] 2 P. Wms. 141. In this case declarations of the testator were admitted, but the propriety of receiving such evidence has been strongly questioned by Lord Abinger in Doe *v.* Hiscocks, 5 M. & W. 371, and the case, as an authority on that point, may be considered overruled.

and these cases will be cited the more readily, because they illustrate a distinction, which has been recognised since the days of Lord Bacon, as subsisting between *latent* and *patent* ambiguities. The leading doctrine on this subject is thus given by that great philosophical lawyer: *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.*[1] Upon which he remarks, that, "there be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was, that the party intended should pass."[2]

§ 1099. The above quotation from Lord Bacon's works has been cited, more out of respect for that great man, than in the expectation that it will afford much practical information. So far as patent ambiguities are concerned, Lord Bacon expounds the law with sufficient precision; for no doubt can be entertained that when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded. If, therefore, a testator,

[1] Bacon's Maxims, Reg. 23. [2] See Bacon's Law Tracts, p. 99, 100.

after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will, so far as regarded the residuary bequest, would be inoperative and void. So, where Sir Gilbert East indulged the strange caprice of leaving his property to persons whom he designated by the letters of the alphabet, stating at the end of his will that the key to the initials was in his writing-desk on a card; the intended objects of his bounty were defeated by his next of kin, no card being found of as old a date as the will. A card, indeed, was discovered, which would have furnished a key, had it been admissible; but as it was dated many years after the execution of the will, it could only be regarded as a declaration of the testator; and, the case being one of patent ambiguity, the Court held, in conformity with all the authorities on the subject, that this species of evidence could not be legally admitted.[1]

§ 1100. But the cases go much further than this; and it is especially necessary to guard against the supposition that, because no ambiguity arises on the face of the instrument, any doubt, which is occasioned by the introduction of extrinsic evidence may be cleared up by having recourse to the declarations of the writer's intention. This is not the law; and many instances of strictly *latent* ambiguities might be given, where evidence of declarations of intention would be inadmissible. For, in the first place a will, apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be uncertain; that is, the persons or things may prove not to have been described with *legal certainty.* Suppose a bequest be made to the *four* children of A., and it appears that A. has *six* children, two by a first marriage, and the remainder by a second. Here, though evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, it seems that

[1] Clayton *v.* Lord Nugent, 13 M. & W. 200. See Kell *v.* Charmer, 23 Beav. 195, cited ante, § 1083 A; and see also Whateley *v.* Spooner, 3 Kay & J. 542, cited ante, § 1083.

proof of the testator's declarations of intention could not be received.[1]

§ 1101. Secondly, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another.* The voice is Jacob's voice, but the hands are the hands of Esau. Here the law, with questionable policy, attaches somewhat greater weight to the *name* than to the *description* of the legatee; and, therefore, if there be nothing in the rest of the will, or in the evidence received, to show who was meant, the person rightly named will take in preference to him who is only rightly described.[2] Still, this doctrine, which would seem to have been first promulgated by Lord Bacon,[3] and which is embodied by him in the Latin maxim, "Veritas nominis tollit errorem demonstrationis," is very far from being recognised as an inflexible rule;[4] and, consequently, if the Court, by looking at the context and the surrounding facts, and placing itself, as near as may be, in the situation of the testator at the time of executing the instrument, can *clearly* ascertain from the language of the will thus illustrated, which of the two claimants was intended by the testator, it will award the legacy to the one so meant to be benefited, though the maxim may in such case chance to be contravened.[5]

§ 1102. The case of Ryall *v.* Hannam[6] affords a striking illustration of this rule. There, a testator devised an estate to

[1] Doe *v.* Hiscocks, 5 M. & W. 371, per Lord Abinger, questioning Hampshire *v.* Peirce, 2 Ves. Sen. 216.

[2] Lord Camoys *v.* Blundell, 1 H. of L. Cas. 786, per Parke, B., pronouncing the opinion of the judges.

[3] Lord Camoys *v.* Blundell, 1 H. of L. Cas. 792, per Lord Brougham.

[4] Id. 778, 786, 792; Thomson *v.* Hempenstall, 7 Ec. & Mar. C. 141, per Dr. Lushington; 1 Roberts., Ec. R., 783, S. C.

[5] Doe *v.* Huthwaite, 3 B. & A. 632, explained by Lord Abinger in Doe *v.* Hiscocks, 5 M. & W. 369, 372; Blundell *v.* Gladstone, 11 Sim. 467, 485—488; 1 Phill. 279, 282, 283, S. C.; 1 H. of L. Cas. 778, nom. Lord Camoys *v.* Blundell; Bernasconi *v.* Atkinson, 10 Hare, 345; in re Bridget Feltham, 1 Kay & J. 528.

[6] 10 Beav. 536. See also Douglas *v.* Fellows, 1 Kay, 114.

his nephew for life, with remainder over to "*Elizabeth Abbott*, a *natural daughter* of Elizabeth Abbott, of Gillingham, single woman, who had formerly lived in his service." It appeared that, at the date of the will in 1798, Elizabeth Abbott, the mother, was the wife of John Caddy, and had had two children only, both of whom were then living. One was a *natural son* named John, who was born in 1791, before his mother's marriage, and shortly after she had left the testator's service, and of whom the testator's nephew was the putative father; the other, born in 1795, was a *legitimate daughter* by John Caddy, named Margaret. It further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to the date of the will; but no proof was given that he knew whether the natural child was a boy or a girl. The claimants of the estate were the son John, the daughter Margaret, and the heir at law. Under these circumstances, Lord Langdale, after much doubt, came to the conclusion, that the testator meant to provide for his nephew's natural child by Elizabeth Abbott, his servant, and that the mistake of the name and sex was not sufficient to defeat the devise. In another case,[1] a man, during the lifetime of his wife, Mary, had married a second wife, Caroline, with whom he continued to reside up to the date of his decease. Shortly before his death, he devised certain property to "his dear wife Caroline," and the question was, which of the two ladies, for both survived him, was designated by the will: the lawful wife who was wrongly, or the unlawful wife who was rightly, named. The Court, without hesitation, held, that Caroline was entitled to take under the devise.

§ 1103. It must, however, be borne in mind, that in cases of this nature, the Court cannot receive declarations of the testator as to what he intended to do in making his will. This was the precise point determined in the leading case of Doe *v.* Hiscocks.[2]

[1] Doe *v.* Rouse, 5 Com. B. 422; Adams *v.* Jones, 21 L. J., Ch., 352, per Turner, V. C.

[2] 5 M. & W. 363, 371, where Lord Abinger questions and overrules the contrary dicta of Lord Kenyon and Lawrence, J., in Thomas *v.* Thomas, 6 T. R. 677, 678.

There, a testator devised lands to his son, John Hiscocks, for life; and after his decease, to his grandson, "*John*, the *eldest* son of the said John Hiscocks." In fact, the testator's son had been twice married; by his first wife he had Simon, but John was the eldest son of the second marriage. Under these circumstances, the Court held, that evidence of the instructions given by the testator for his will, and of his declarations, was inadmissible, for the purpose of showing which of these two grandsons was intended by the language employed.[1]

§ 1104. Thirdly, the description, though applicable in no respect to more than one person or thing shown to be in existence, may *not accurately specify* even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declarations cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative; but if, after rejecting so much of the description as is false, the *remainder* will enable the Court to *ascertain with legal certainty the subject-matter* to which the instrument really applies, it will be allowed to take effect.[2] The[3] rule in such cases is derived from the civil law;—*Falsa demonstratio non nocet, cum de corpore constat.* It is, however, essential, that enough should remain to show plainly the intent. "The rule," said Mr. Justice Parke,[4] "is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It matters not which part of the description is placed first, and which last, in the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at

[1] See also Douglas *v.* Fellows, 1 Kay, 114; Bernasconi *v.* Atkinson, 10 Hare, 345.

[2] See Ford *v.* Batley, 23 L. J., Ch., 225.

[3] Gr. Ev., § 301, in part.

[4] Doe *v.* Galloway, 5 B. & Ad. 43, 51. See also Doe *v.* Hubbard, 15 Q. B. 227; Doe *v.* Carpenter, 16 Q. B. 181.

once, yet the mind of the author comprehends them at once, which gives vitam et modum to the sentence."[1]

§ 1105.[2] Therefore, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and now in the occupation of one S., lying" within certain specified abuttals, "with all the houses thereto belonging, and which are now in the occupation of the said S.," a house lying within the abuttals, though not in the occupation of S., was held to pass.[3] So, by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," the whole farm passed, though it was not all in C.'s occupation.[4] So, also, a devise of all the testator's *freehold* houses in Aldersgate-street, when in fact he had only leasehold houses there, has been held in substance and effect to be a devise of his houses in that street, and the word freehold has been rejected as surplusage.[5] So, if a landlord, having but one house in a street, were to describe it in a lease by a wrong number, and then let a tenant into possession under it, he could not afterwards rely on the error, and contend that no interest had passed; for the number would be rejected as an immaterial part of the description.[6] And so, where land was described in a patent as lying in the county of M., and further described by reference to natural monuments; and it appeared that the land described by the monuments was in the county of H., and not of M.; that part of the description which related to the county, was rejected. The entire description in the patent, said the Court, must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant description, which, by the other descriptions in the patent, clearly appears to have been made through mistake, that does not make

[1] Stukeley v. Butler, Hob. 171.

[2] Gr. Ev. § 301, in part.

[3] Doe v. Galloway, 5 B. & Ad. 43; Dyne v. Nutley, 14 Com. B. 122.

[4] Goodtitle v. Southern, 1 M. & Sel. 299, recognised as law in Miller v. Travers, 8 Bing. 253.

[5] Day v. Trig, 1 P. Wms. 286, cited with approbation by Tindal, C. J., in Miller v. Travers, 8 Bing. 253; Doe v. Cranstoun, 7 M. & W. 1, 10, 11, per Parke, B.

[6] Hutchins v. Scott, 2 M. & W. 816, per Lord Abinger. See Hitchin v. Groom, 5 Com. B. 515.

void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void.[1] So, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands, which he owned, will be taken to be the true one, and the other will be rejected as falsa demonstratio.[2]

§ 1106. The rule which rejects erroneous description, and admits parol evidence for the purpose of showing how the mistake arose, was carried to its extreme bounds in the cases of Selwood *v.* Mildmay,[3] and Lindgren *v.* Lindgren.[4] In the former of these cases, a testator had devised to certain legatees 1250*l.*, which he described as "part of his stock in the 4 per cent. annuities of the Bank of England." At the date of the will, and thence up to the

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[1] Boardman *v.* Reed and Ford's lessees, 6 Peters, 328, 345, per McLean, J.

[2] Loomis *v.* Jackson, 19 Johns. 449 ; Lush *v.* Druse, 4 Wend. 313 ; Jackson *v.* Marsh, 6 Cowen, 281 ; Worthington *v.* Hylyer, 4 Mass. 196 ; Blague *v.* Gold, Cro. Car. 447 ; Swyft *v.* Eyres, id. 548. The object in cases of this kind is to interpret the instrument, that is, to ascertain the intent of the parties. The rule to find the intent is, to give most effect to those things about which men are least liable to mistake. Davis *v.* Rainsford, 17 Mass. 210 ; McIver *v.* Walker, 9 Cranch, 178. On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled in America. *First*, The highest regard is had to natural boundaries. *Secondly*, To lines actually run, and corners actually marked, at the time of the grant. *Thirdly*, If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required ; marked lines prevailing over those which are not marked. *Fourthly*, To courses and distances ; giving preference to the one or the other according to circumstances. See Cherry *v.* Slade, 3 Murphy, 82 ; Dogan *v.* Seekright, 4 Hen. & Munf. 125, 130 ; Preston *v.* Bowmar, 6 Wheat. 582 ; Loring *v.* Norton, 8 Greenl. 61 ; 2 Flintoff on Real Property, 537, 538. Words necessary to ascertain the premises must be retained ; but words not necessary for that purpose may be rejected, if inconsistent with the others. Worthington *v.* Hylyer, 4 Mass. 205 ; Jackson *v.* Sprague, 1 Paine, 494 ; Vose *v.* Handy, 2 Greenl. 322. The expression of quantity is descriptive, and may well aid in finding the intent, where the boundaries are doubtful. Mann *v.* Pearson, 2 Johns. 37, 41 ; Perkins *v.* Webster, 2 N. Hamp. 287 ; Thorndike *v.* Richards, 1 Shepl. 437.

[3] 3 Ves. 306.

[4] 9 Beav. 358.

time of his death, the testator had no such stock, but he had had some money in the 4 per cents. some years before, and had sold it out, and invested the produce in Long Annuities. Proof of these facts being tendered, the Master of the Rolls admitted the evidence, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and his Honour then held, that, as the testator obviously meant to give the legacies, but mistook the fund, the only effect of the mistake as explained by the evidence was, that the legacies ceased to be specific, and must consequently be paid out of the general personal estate. The circumstances in Lindgren *v.* Lindgren were nearly identical with those in Selwood *v.* Mildmay, and Lord Langdale's judgment proceeded on the same grounds as those on which the former decision was founded. "It is very necessary to observe," said his lordship, "that in the case of Selwood *v.* Mildmay, the evidence was received only for the purpose stated by the Master of the Rolls in his judgment," that is, in order to show how the mistake arose, "and not, as it has been erroneously supposed,[1] for the purpose of showing that the testator, when he used the erroneous description of the 4 per cent. stock, meant to bequeath the Long Annuities, which he had purchased with the produce of the 4 per cent. stock; and that the result of the case was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath;—not to substitute the Long Annuities which the testator had, and did not purport to give, for the 4 per cent. Bank Annuities which he had not, and did purport to give;" but simply to render legacies, which were primâ facie specific, payable out of the general personal estate.[2]

§ 1107. In connexion with this subject, notice may be taken of a somewhat arbitrary rule of construction, which prevails in Courts

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[1] In Miller *v.* Travers, 8 Bing. 252, 253; and Doe *v.* Hiscocks, 5 M. & W. 370.

[2] 9 Beav. 363. See also Quennell *v.* Turner, 13 Beav. 240; and Hunt *v.* Tulk, 2 De Gex, M. & Gord. 300, in which last case the Lords Justices, in order to set right what appeared to them to be an obvious clerical error, held that the words "fourth schedule," in a will, should be read as if they were "fifth schedule."

of Equity with reference to the interpretation of wills. The rule is, that if legacies be given to any specified number of children, as, for instance, 500*l.* a-piece to the *three* children of A., and it turn out that at the date of the will A. had a larger number of children, the Court will reject the number mentioned in the will, upon the presumption of mistake, and will award a legacy of 500*l.* to each of A.'s children.[1]

§ 1108. Although false statements, which have been introduced into an instrument by way of affirmation only, may be rejected, provided the remaining description be sufficient to identify the person or thing intended, they cannot be disregarded, if they have been used by way of *exception* or *limitation;* because, in this latter case, it is obvious that they were intended to have a *material* operation.[2] Moreover, the reader must not lose sight of another acknowledged rule of construction, that if there be one subject-matter, wherein all the demonstrations in a written instrument are true, and another wherein part are true and part false, the words of such instrument shall be intended words of true limitation to pass only that subject-matter wherein all the circumstances are true.[3] Such is the correct meaning of the maxim enunciated by Lord Bacon, "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."[4] Thus, where a devise was of "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk;" and it appeared that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name; the Court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract.[5] So, under a bill of sale assigning "all the household

[1] Daniell *v.* Daniell, 3 De Gex & Sm. 337; Morrison *v.* Martin, 5 Hare, 507; Lee *v.* Pain, 4 Hare, 249, 250; Scott *v.* Fenoulhett, 1 Cox, 79; Yeats *v.* Yeats, 16 Beav. 170.

[2] Taylor *v.* Parry, 1 M. & Gr. 623, per Maule, J.

[3] Doe *v.* Bower, 3 B. & Ad. 459, 460, per Parke, J.

[4] Morrell *v.* Fisher, 4 Ex. R. 604, per Alderson, B.

[5] Doe *v.* Bower, 3 B. & Ad. 453; Pogson *v.* Thomas, 6 Bing. N. C. 337; Doe *v.* Ashley, 10 Q. B. 663.

goods of every description at No. 2, Meadow Place, more particularly set forth in an inventory of even date herewith," no goods will pass except those specified in the inventory.[1] Where a testator devised to A. his *freehold* messuage, farm, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a peppercorn rent, the Court held that as the devise correctly described the freehold, the leasehold part was not included therein, though it was proved that this part was interspersed with, and undistinguishable from, the freehold, and that the whole farm had always been treated as freehold by the testator.[2] It seems that this last rule will be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; for it is an established doctrine of construction, that an heir-at-law shall not be disinherited except by express words.[3]

§ 1109. From the preceding cases and observations the following rules may be collected. First, where in a written instrument the description of the person or thing intended *is applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author.[4] Secondly, if the description of the person or thing be *partly applicable* and *partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible.[5] Thirdly, if the description be partly correct, and partly incorrect, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the

[1] Wood *v.* Rowcliffe, 6 Ex. R. 407; Morrell *v.* Fisher, 4 Ex. R. 591; Barton *v.* Dawes, 10 Com. B. 261.

[2] Stone *v.* Greening, 13 Sim. 390; Hall *v.* Fisher, 1 Coll. R. 47; Quennell *v.* Turner, 13 Beav. 240.

[3] Doe *v.* Bower, 2 B. & Ad. 459, per Parke, J.

[4] Wigram on Wills, 160.

[5] Doe *v.* Hiscocks, 5 M. & W. 33.

incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement.[1] Fourthly, if the description be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe.[2] Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect.[3]

§ 1110.[4] It remains only to notice a class of cases, in which parol declarations of intention, in common with other extrinsic evidence, are allowed by Courts of Equity to affect the operation of a writing, though the writing on its face is free from ambiguity. The class alluded to embraces all those cases in which evidence is offered *to rebut an equity*.[5] The meaning of this is, that, where Courts of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise.[6] The simplest instance of this occurs, when two legacies, left to the same person by different testamentary instruments, are, contrary to the general rule,[7] presumed not to have been intended as cumulative, on the ground that the sums and the expressed motives of both exactly correspond. Here, to rebut the presumption, which makes one of these legacies inoperative, parol evidence of every kind will be received; its

[1] Wigram on Wills, 54, 55.

[2] Id. 163.

[3] Doe v. Hiscocks, 5 M. & W. 369, 370, per Lord Abinger; Wigram on Wills, 12, cited ante, § 1034, n. 4.

[4] Gr. Ev., § 296, in part.

[5] See Buckley v. Littlebury, 2 Vern. 621; 3 Br. P. C. 43, S. C.; Francis v. Dichfield, 2 Coop. C. P. R. 532.

[6] Hall v. Hill, 1 Dru. & War. 113, 114, per Sugden, C.; Hurst v. Beach, 5 Madd. 351; Trimmer v. Bayne, 7 Ves. 518, per Lord Eldon.

[7] See Russell v. Dickson, 4 H. of L. Cas. 293; Brennan v. Moran, 6 Ir. Eq. R., N. S., 126.

effect being, not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed.[1] In like manner, extrinsic evidence is admissible to repel the presumption against double portions,[2] which Courts of Equity raise, when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will.[3] So, also, to repel the presumption, that the portionment of a legatee by a parent or person in loco parentis,[4] was intended to operate as an ademption, though only pro tanto, of the legacy.[5] Again, Courts of Equity,—after establishing the somewhat forced presumption, that a debt due from a testator is intended to be satisfied by a legacy of a greater or equal amount bequeathed by him to his creditor,[7]—have been so little satisfied with the law thus made, that for a long period they have eagerly caught at any trifling circumstance, whether arising out of the language of the will,[8] or brought under their notice by extrinsic evidence,[9] in order to afford them an excuse for evading a rule of such questionable policy.[10] Another illustration is furnished by the doctrine of resulting trusts, where a man purchases a property in the name of a stranger. Here, as before observed,[11] the law raises a presumption in favour of the person who paid the pur-

[1] Hurst v. Beach, 5 Madd. 351, 359, 360, per Sir John Leach, V. C.; recognised in Hall v. Hill, 1 Dru. & War. 116, 127, by Sugden, C.

[2] See Montague v. Montague, 15 Beav. 565.

[3] Weall v. Rice, 2 Russ. & Myl. 251, 267; E. of Glengall v. Barnard, 1 Keen, 769, 793; Hall v. Hill, 1 Dru. & War. 128—131, per Sugden, C., explaining and limiting the two former cases. See Lady E. Thynne v. E. of Glengall, 2 H. of L. Cas. 153—155.

[4] See Benham v. Newell, 24 L. J., Ch., 424, per Romilly, M. R.; S. C. nom. Palmer v. Newell, 20 Beav. 32.

[5] Pym v. Lockyer, 5 Myl. & Cr. 29, per Lord Cottenham; recognised in Suisse v. Lowther, 2 Hare, 434, per Wigram, V. C.

[6] Trimmer v. Bayne, 7 Ves. 515, per Lord Eldon; Hall v. Hill, 1 Dru. & War. 120; Kirk v. Eddowes, 3 Hare, 517, per Wigram, V. C.; Hopwood v. Hopwood, 26 L. J., Ch., 292; 22 Beav. 488, S. C. See ante, § 1048.

[7] Brown v. Dawson, Prec. in Ch. 240; Fowler v. Fowler, 3 P. Wms. 353.

[8] Rowe v. Rowe, 2 De Gex & Sm. 297; Mathews v. Mathews, 2 Ves. Sen. 636; Bartlett v. Gillard, 3 Russ. 156.

[9] Wallace v. Pomfret, 11 Ves. 547.

[10] See Edmunds v. Low, 3 Kay & Johns. 318. [11] Ante, § 930.

chase money; but still the stranger may give parol evidence to support his title, and show that the purchase was intended for his benefit, that is, he may rebut the presumption, and support the instrument.[1] So, the presumption of the revocation of a will, which, before the new Will Act,[2] arose from marriage and the birth of a son, might, at one time,[3] have been rebutted by parol evidence, showing that the testator did not intend to revoke the instrument.[4]

§ 1111. In all these cases, where parol evidence has been *first* admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument, counter evidence will likewise be received to *fortify* the presumption; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded.[5] But here it must be carefully noted, that, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced; for, in the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument.[6] If, then, the circumstances, on the face of the instrument, are such as to rebut the presumption drawn by the law, or if the Court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either event, the

[1] Hall *v.* Hill, 1 Dru. & War. 114, per Sugden, C. See also Sidmouth *v.* Sidmouth, 2 Beav. 447.

[2] 7 Will. 4 & 1 Vict., c. 26, §§ 18, 19.

[3] See ante, § 978.

[4] Hall *v.* Hill, 1 Dru. & War. 114, 115. So, before the Act of 11 Geo. 4 & 1 Will. 4, c. 40, which made executors trustees of the undisposed of residue for the persons entitled thereto under the Statute of Distributions, the presumption against an executor's title to the residue, from the fact that a legacy had been given to him, was liable to be rebutted by parol evidence. Id.; Lady Granville *v.* Duchess of Beaufort, 1 P. Wms. 115, 116. See Briggs *v.* Penny, 3 De Gex & Sm. 525; and Ellcock *v.* Mapp, 3 H. of L. Cas. 492.

[5] Kirk *v.* Eddowes, 3 Hare, 517, 520; Hall *v.* Hill, 1 Dru. & War. 121.

[6] Id.

effect of the evidence would be to contradict the apparent meaning of the writing.[1]

§ 1112. The important case of Hall *v.* Hill[2] affords a good illustration of this distinction. There a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of 800*l.*, part to be paid during his life, and the residue at his decease. He subsequently by his will bequeathed to his daughter a legacy of 800*l.*; and the question was, whether this legacy could be considered as a satisfaction of the debt. Parol evidence of the testator's declarations was tendered to show that such was his real intention, and Lord Chancellor Sugden acknowledged that the evidence, if admissible, was conclusive on the subject.[3] His lordship, however, finally decided, that though the debt was to be regarded in the light of a portion,[4] yet as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, it could not, under the circumstances, be raised by the Court; and the consequence was, that the declarations were rejected. Indeed, the evidence would have been equally inadmissible in the first instance, on the ground of its inutility, had the ordinary presumption arisen; though, in such case, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 1113. With the view of clearly understanding the subject under discussion, it is essential to distinguish between mere *legal pre-*

[1] Benham *v.* Newell, 24 L. J., Ch., 429, per Romilly, M. R.; S. C. nom. Palmer *v.* Newell, 20 Beav. 32.

[2] 1 Dru. & War. 94. This case deserves an attentive perusal, the judgment of Sugden, C., containing an elaborate discussion of all the important authorities on the subject. The cases of Wallace *v.* Pomfret, 11 Ves. 542; Coote *v.* Boyd, 2 Bro. C. C. 521; Weall *v.* Rice, 2 Russ. & Myl. 251, 263; Booker *v.* Allen, 2 Russ. & Myl. 270; and Lloyd *v.* Harvey, id. 310, are much shaken, if not overruled by this decision.

[3] 1 Dru. & War. 112.

[4] Id. 108, 109.

sumptions, and *rules of construction;* because, while the former may be rebutted, and if rebutted, supported also, by parol testimony, no evidence can be received on either side, if the Court *by construction* can arrive at a conclusion respecting the meaning of the instrument.[1] Yet, important as it is to mark this distinction, it is by no means easy on all occasions to do so; and the difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. Thus, instead of confining it to its strict sense, as meaning an inference raised by the Courts independently of, or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language.[2] For instance, in Coote v. Boyd,[3] Lord Thurlow says, "where the *presumption* arises from the construction of words, simply quâ words, no evidence can be admitted;" evidently using the word presumption as tantamount to a rule of law. Among the rules of construction, which have occasionally been mistaken for legal presumptions, may be mentioned the one now clearly established, which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the Court to presume that repetition, and not accumulation, was intended.[4] Extrinsic evidence cannot be received to impugn this rule; for to admit it would be to construe a writing by parol evidence.[5]

[1] Lee v. Pain, 4 Hare, 216, per Wigram, V. C.; Hall v. Hill, 1 Dru. & War. 116, 122, 126, 132, 133, per Sugden, C.

[2] Lee v. Pain, 4 Hare, 216, 217, per Wigram, V. C.

[3] 2 Bro. C. C. 527.

[4] Hurst v. Beach, 5 Madd. 358; Suisse v. Lowther, 2 Hare, 424, 432, 433; Lee v. Pain, 4 Hare, 216—218; Kirk v. Eddowes, 3 Hare, 516; Roch v. Callen, 6 Hare, 531.

[5] Id.

PART III.

INSTRUMENTS OF EVIDENCE.

CHAPTER I.

WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

§ 1114. In the *Third Part* of this work, it is intended to treat of the Instruments of evidence, or, in other words, of the means by which facts are proved. In dealing with this subject an attempt will be made to show how such instruments are obtained, in what manner they are used, to what extent, and under what circumstances, they are admissible, and what is their effect.

§ 1115.[1] Now, the Instruments of Evidence are divided into two classes, the *unwritten*, and the *written*. By *unwritten*, or *oral evidence*, is meant the testimony given by witnesses, *vivâ voce*, either in open court, or before a magistrate or other officer, acting by virtue of a commission or other legal authority. Under this head it is proposed briefly to consider, 1. The methods, in general, of procuring the attendance and testimony of witnesses;—2. The competency of witnesses;—3. The practice which obtains in the examination of witnesses; and herein, of the impeachment and the corroboration of their testimony.

§ 1116. In *criminal cases*, the ordinary and most effectual method of enforcing the attendance of witnesses for the Crown is by *recognisance*, which is a bond of record, testifying that the recognisor owes the Queen a certain sum, to be levied on his goods and tenements for the use of her Majesty, if he fail to appear and give evidence at the time and place specified in the condition.[2]

[1] Gr. Ev., §§ 307, 308, in great part.

[2] See form in Sched. (O. 1) to 11 & 12 Vict., c. 42.

By statute 11 & 12 Vict., c. 42, § 20, the justice before whom the preliminary investigation is heard, is authorised in all cases, whether of felony or misdemeanor, to bind by recognisance all such persons as know the facts or circumstances of the case, to appear and give evidence before the grand jury and at the trial against the party accused;[1] and the Act of 7 Geo. 4, c. 64, gives similar power to all coroners, taking an inquisition, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact.[2]

§ 1117. These provisions, which respectively apply to justices and coroners not only of counties, but of all other jurisdictions,[3] are obviously of great use in promoting the due administration of justice; but, in order to avoid any hardship which, in the event of non-attendance, witnesses might incur from having their recognisances indiscriminately estreated, it is enacted, that the officer of the court, by whom the estreats are made out, shall prepare a written list of defaulters, specifying the name, residence, and trade or profession of each, the nature of the offence respecting which he was to testify, the cause, if known, of his absence, and the fact whether by reason of his non-attendance the ends of justice have been defeated or delayed. This list must then be laid before the judge at the assizes, or before the recorder or other corporate officer, or the chairman or two other justices of the peace at the sessions, who are respectively required to examine it, and to make such order touching the estreating of the recognisances as they shall consider just; but no recognisance can be estreated or put in process, without the written order of the presiding judge or other persons, before whom the list has been laid.[4] If the witness,

[1] The corresponding Irish Act, 14 & 15 Vict., c. 93, enacts in § 13, clause 6, that "whenever in cases of indictable offences the justice or justices shall see fit, they may bind the witnesses by recognisance to appear at the trial of the offender and give evidence against him," and if such witnesses refuse to be bound, they may be committed. The form of the recognisance is given in the Schedule of the Act.

[2] 7 Geo. 4, c. 64, § 4; 9 Geo. 4, c. 54, § 4, Ir.

[3] 11 & 12 Vict., c. 42, §§ 1, 16, 20; 7 Geo. 4, c. 64, § 6; 14 & 15 Vict., c. 93, § 44, Ir.

[4] 7 Geo. 4, c. 64, § 31; 9 Geo. 4, c. 54, § 34, Ir.

after having been examined on oath before the magistrate or coroner, shall refuse to be bound over, he may be committed;[1] and where a married woman, who could not enter into her own recognisance, refused either to appear at the sessions or to find sureties for her appearance, the Court held that the justice was fully warranted in committing her, in order that she might be forthcoming as a witness at the trial.[2] It seems that a recognisance to prosecute or give evidence is binding on an infant; at least, it has been held that infancy is no ground for discharging a forfeited recognisance to appear at the assizes to prosecute for felony;[3] but the better opinion is, that a justice is not authorised to commit any witness for refusing to find sureties to be bound with him, provided he be willing to enter into his own recognisance.[4]

§ 1118. This mode of enforcing the attendance of witnesses is not confined to proceedings by indictment, but may be adopted in several cases, where an appeal lies to the sessions from the conviction of one or more justices. Thus for example, the Act of 9 Geo. 4, c. 61, which was passed to regulate alehouses, after enacting, in § 27, that any person, who thinks himself aggrieved by any act of any justice done in execution of that Act, may appeal to the sessions, on giving due notice to the justice of his intention so to do, and entering into his recognisance with two sufficient sureties to appear at the sessions, try the appeal, abide by the judgment of the Court, and pay the costs awarded;—provides that, in such case, the justice, before whom the recognisance shall have been entered into, may summon any person, whose evidence shall appear material, and require him to be bound in recognisance to appear at the sessions, and to give evidence in such appeal; and in case such person shall neglect or refuse to obey the summons, or shall refuse to enter into the

[1] 11 & 12 Vict., c. 42, § 20; 2 Hale, P. C. 282; Bennet *v.* Watson, 3 M. & Sel. 1; 9 Geo. 4, c. 54, § 2, Ir. See Ashton's case, 7 Q. B. 169.

[2] Bennet *v.* Watson, 3 M. & Sel. 1.

[3] Ex parte Williams, 13 Price, 670; M'Clel. 493, S. C.

[4] Per Graham, B., as cited 2 Ch. Burn's J., 122, per Lord Denman in Evans *v.* Rees, 12 A. & E. 59.

recognisance, he may be apprehended by the warrant of the justice; and if he shall still refuse to enter into such recognisance, he may be committed to prison. So if any person, convicted of a third offence against the Act passed to permit the retail of beer and cyder,[1] shall appeal to the sessions, and enter into the recognisance mentioned in the Act, the justices, who shall take such recognisance, are *required* to bind the person who shall make the charge in a recognisance to appear at the sessions, to give evidence against the person so charged; "and, in like manner, to bind any other person who shall have any knowledge of the circumstances of such offence."[2] Again, the statute for the punishment of rogues and vagabonds[3] enacts, in § 9, that when any justice shall commit any incorrigible rogue to the house of correction, there to remain till the next sessions, or when any idle or disorderly person, rogue and vagabond, or incorrigible rogue, shall give notice of his intention to appeal, and shall enter into recognisances to prosecute such appeal, such justice shall require the person by whom such offender shall be apprehended, and the persons whose evidence shall appear material to prove the offence, and to support such conviction, to become bound in recognisance to appear at the sessions, to give evidence against such offender; and the justices at sessions are empowered to order the treasurer of the county, &c., to pay such sum to the prosecutor and witnesses, as will re-imburse them for their expenses and trouble and loss of time; and in case any such person shall refuse to enter into such recognisance, the justice may commit him to prison.

§ 1119. Similar clauses, varied, as to their language, according to the taste or practical knowledge of the draughtsmen, are scattered through the volumes of the statutes;[4] though in numerous instances, as in the larceny Act,[5] the Act relating to

[1] 11 Geo. 4 & 1 Will. 4, c. 64.
[2] § 16. See also 4 & 5 Will. 4, c. 85, § 11; and 3 & 4 Vict., c. 61, § 21.
[3] 5 Geo. 4, c. 83.
[4] See the Act for the suppression of Gaming Houses, 17 & 18 Vict., c. 38, § 10; and that regulating the slaughter of horses, 7 & 8 Vict., c. 87, § 9.
[5] 7 & 8 Geo. 4, c. 29, § 72.

malicious injuries to property,[1] the Game Acts,[2] the Act regulating mines and collieries,[3] the Act to prevent frauds of manufacturers,[4] the Lunatic Asylums Act of 1853,[5] the Coal-whippers Act of 1851,[6] and in many more that might be cited, the power of binding witnesses by recognisance is omitted in the clauses giving an appeal to the sessions; and in some statutes, as in those which relate to buildings in the metropolis,[7] and to the embezzlement of public stores,[8] the justices in sessions, to whom the appeal lies, are expressly empowered to call witnesses before them by summons or precept.

§ 1120.[9] A *second mode*[10] of procuring the attendance of witnesses, which may be adopted in criminal cases, and which constitutes the ordinary summons in civil proceedings, is by serving the witness with a *writ of subpœna ad testificandum*. This a judicial writ, directed to the witness, commanding him in the Queen's name and under a certain penalty,[11] to appear at the Court, and to testify what he knows in a cause pending therein, which is described in the writ. If the witness be required to produce any books or papers in his possession, a clause to that effect is inserted in the writ, which is then termed a *subpœna duces tecum*.[12]

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[1] 7 & 8 Geo. 4, c. 30, § 38.

[2] 52 Geo. 3, c. 93, Sched. L, § 13; 1 & 2 Will. 4, c. 32, § 44; 9 Geo. 4, c. 69, § 6.

[3] 5 & 6 Vict., c. 99, § 21.

[4] 6 & 7 Vict., c. 40, § 29.

[5] 16 & 17 Vict., c. 97, § 128.

[6] 14 & 15 Vict., c. 78, § 35.

[7] 7 & 8 Vict., c. 84, § 53.

[8] 39 & 40 Geo. 3, c. 89, § 21.

[9] Gr. Ev., § 309, in part.

[10] A portion of the following 34 pages has already appeared in the Law Rev., No. 2, p. 284—297.

[11] In the forms issued by the Court of Chancery, the penalty is omitted.

[12] This additional clause is to the following effect:—"and also, that you do diligently and carefully search for, examine, and inquire after, and bring with you and produce at the time and place aforesaid, a bill of exchange, dated" &c. (here describing with precision the papers and documents to be produced,) "together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in the said cause; then and there to testify and show all and singular those things, which you (or either of you) know, or the said documents, letters, or instru-

§ 1121. When a witness is served with a subpœna duces tecum, he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the judge, who will decide upon the validity of any excuse that may be offered for withholding them.[1] An attachment, therefore, will lie against an overseer or solicitor of a parish, who, in an inquiry touching the settlement of a pauper, refuses to bring the rate-books of such parish to the petty sessions, in obedience to a Crown office subpœna; though it may be very questionable whether he would be bound to submit these books to examination, in the event of his bringing them into court.[2] So, the fact that the legal custody of the instrument belongs to another person will not authorise a witness to disobey the subpœna, provided the instrument be in his actual possession;[3] but documents filed in a public office are not so in the possession of the clerk, as to render it necessary, or even allowable, for him to bring them into court, without the permission of the head of the office.[4]

§ 1122.[5] Writs of subpœna suffice for only one sitting or term of the Court; and, therefore, if the cause be made a remanet, or be adjourned to another term or session, the writ must be resealed, and the witness summoned anew.[6] But a subpœna, requiring the party to attend a trial on the commission-day extends to the whole assizes, which, by a curious fiction of law, are supposed to last but one day.[7] Again, if any alteration be made in the writ, after it is sued out, though before it is served, it must be re-

ments in writing do import, of and concerning the said cause now depending. And this you (or any of you) shall in no wise omit," &c. 3 Chitty's Gen. Pract. 830, n.; Amey v. Long, 9 East, 473.

[1] Amey v. Long, 9 East, 473; 6 Esp. 116; 1 Camp. 14 S. C. See ante, § 22; and as to what is a valid excuse, see ante, §§ 428—430.

[2] R. v. Greenaway, and R. v. Carey, 7 Q. B. 126.

[3] Amey v. Long, 1 Camp. 14, per Lord Ellenborough.

[4] Thornhill v. Thornhill, 2 Jac. & W. 347; Austin v. Evans, 2 M. & Gr. 430.

[5] Gr. Ev., § 309, as to first four lines.

[6] Sydenham v. Rand, 3 Doug. 429; S. C. cited 2 Tidd, 855, 8th ed.

[7] Scholes v. Hilton, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; Swanne v. Taaffe, 8 Ir. Law R. 101.

sealed; and, therefore, when the day of appearance named in a subpœna was altered by an attorney from one term to another, it was held that the writ thereby became void, and that the witness, on whom it was served subsequently to the alteration, might treat it as waste paper.[1] The writ, also, must appear to be issued while the Court is sitting; for, if it bears teste out of term, it is void.[2] The time is surely come when this unreasonable and inconvenient rule should be abolished.

§ 1123.[3] The service of a subpœna upon a witness ought always to be made a *reasonable time* before trial, to enable him to put his affairs in such order, that his attendance on the Court may be as little detrimental as possible to his interests.[4] On this principle, a summons in the morning to attend in the afternoon of the same day, has more than once been held insufficient, though the witness lived in the same town, and very near to the place of trial.[5] Where, however, a witness was served at twelve o'clock, while standing on the steps of the court-house, and being then told that the cause was coming on that day, replied, "very well," the Court held that his non-attendance at five o'clock, when the trial was heard, rendered him liable to an action, since his answer was equivalent to an admission that the service was in time.[6] So, if a witness attend a trial in obedience to a subpœna, he cannot refuse to be examined on the ground of any irregularity in the service.[7] So, if a witness be in court as a spectator, he cannot, it seems, object to give evidence, on the ground that the subpœna has only just been served upon him;[8] though, if he be an attorney, who is engaged in winding up another cause, the rule may be different; or at least it is highly probable that he would not be liable to an attachment for disobedience.[9] Neither in criminal

[1] Barber v. Wood, 2 M. & Rob. 172, per Lord Abinger.

[2] Edgell v. Curling, 2 Dowl. & L. 600; 7 M. & Gr. 958, S. C.

[3] Gr. Ev., § 314, in part. [4] Hammond v. Stewart, 1 Str. 510.

[5] Id.; Barber v. Wood, 2 M. & Rob. 172, per Lord Abinger.

[6] Maunsell v. Ainsworth, 8 Dowl. 869, per Parke and Alderson, Bs.; Jackson v. Seagar, 2 Dowl. & L. 13, per Wightman, J.

[7] Wisden v. Wisden, 6 Beav. 549, per Wigram, V. C.

[8] Doe v. Andrews, 2 Cowp. 845.

[9] Pitcher v. King, 2 Dowl. & L. 755, per Williams, J.

prosecutions can a witness decline to be sworn, though he has not been subpœnaed at all.[1] But, in civil cases a witness may always refuse to be examined, unless he be properly served with a writ.[2] Where a subpœna, requiring the attendance of a witness on the 31st of March, and so on from day to day until the issue should be tried, was served on the 2nd of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April when the cause was heard;[3] though had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would at least have avoided the penalty of an attachment.[4] As the question whether the writ has been served within a reasonable time is in the discretion of the judge,[5] and must vary according to the circumstances of each case, it is hoped that the decisions cited above will sufficiently illustrate the general practice;[6] but it deserves notice, that, in the United States, the reasonableness of the time is generally fixed by statute, one day being usually allowed for every twenty miles that intervene between the residence of the witness and the place of trial. Perhaps a somewhat similar rule might, with advantage, be adopted in this country.

§ 1124. As to the *manner of service*, it is not usual to part with the original writ, which may include the names of four witnesses;[7] but the practice is, to make out for each witness a subpœna-ticket, which is a copy of the writ, or, at least, a statement of its

[1] R. v. Sadler, 4 C. & P. 218, per Littledale, J.

[2] Bowles v. Johnson, 1 W. Bl. 36. See contrà, Blackburn v. Hargreave, 2 Lew. C. C. 259, where Hullock, B., is reported to have held, that, if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered. Sed qu. A witness is not bound to obey a subpœna in a civil cause, unless his expenses be tendered, although the party, who requires his testimony, is suing in formâ pauperis. 2 Lew. C. C. 259, per Hullock, B.

[3] Davis v. Lovell, 7 Dowl. 178.

[4] Id. 183; Alexander v. Dixon, 1 Bing. 366; 8 Moore, 387, S. C.

[5] Barber v. Wood, 2 M. & Rob. 172; ante, § 22.

[6] See further the analogous cases, respecting the reasonable service of a notice to produce, ante, § 415.

[7] See Doe v. Andrews, 2 Cowp. 846.

substance, duly certified,[1] and then to serve the witness *personally* with this ticket, *at the same time showing him the original writ.* It seems that the necessity of personal service will not be dispensed with, even though it be sworn that the witness keeps out of the way to avoid such service;[2] and the provision, which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons.[3]

§ 1125. If the subpœna-ticket vary in any material degree from the original writ, as where the ticket required the witness to attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained.[4] So, the writ must state, with reasonable certainty, the name of the cause, as also the place in which the attendance of the witness is required. Thus, in a subpœna to attend an action of ejectment, the names of all the persons in whom the title is alleged to be, must be introduced;[5] and if it be a town cause, the writ must specify whether it will be tried at Westminster or at Guildhall.[6] Where, however, the subpœna required the attendance of the witness at Westminster Hall, the Nisi Prius sittings being in fact held at the adjoining sessions-house, it was held that an attachment might be granted for non-attendance at the sessions-house, notices being affixed to the wall of the court in Westminster Hall, directing witnesses to proceed to that place.[7] So, where a subpœna, tested the 9th of May and served on the 19th, required

[1] Maddison *v.* Shore, 5 Mod. 355; Cro. Car. 540.

[2] See In re Pyne, 1 Dowl. & L. 703.

[3] Wadsworth *v.* Marshall, 1 Cr. & M. 87; R. *v.* Wood, 1 Dowl. 509, per Littledale, J.; Garden *v.* Cresswell, 2 M. & W. 319; 5 Dowl. 461, S. C.; Jacob *v.* Hungate, 3 Dowl. 456; Pitcher *v.* King, 2 Dowl. & L. 755, per Williams, J.

[4] Doe *v.* Thomson, 9 Dowl. 948, per Wightman, J.

[5] Id. In Ireland it is sufficient if the subpœna be entitled in the name of one of the persons claiming title, Swanne *v.* Taaffe, 8 Ir. Law R. 101.

[6] Milson *v.* Day, 3 M. & P. 333.

[7] Chapman *v.* Davis, 1 Dowl. N. S. 239; 4 Scott, N. R. 319; 3 M. & Gr. 609, S. C.

attendance on the 21st of March instant, the Court considered that this was an error which could not mislead.[1]

§ 1126. In order the more effectually to secure the attendance of witnesses in civil cases, the Act of 5 Eliz., c. 9, made perpetual by 29 Eliz., c. 5, enacts, in § 12, that, if any person upon whom any process of subpœna out of a Court of Record shall be served, "and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges, as, having regard to the distance of the places, is necessary to be allowed," shall, without lawful cause, neglect to appear, he shall *forfeit* 10*l.*, and yield such further recompense to the party aggrieved, as the judge in his discretion shall award. The question as to what constitutes the "*reasonable costs and charges*" of a witness under this statute was left, until recently, very much to the direction of the taxing officers; but that question is now, happily, almost set at rest, so far as it relates to the Superior Courts of Common Law, the Court of Probate, and the County Courts, by the formal adoption of partially fixed scales of remuneration. In the Superior Courts[2] the allowance varies, according to the

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[1] Page *v.* Carew, 1 Cr. & J. 514.

[2] The scale as approved by the judges (see Reg. Gen. H. T. 16 Vict., 1 E. & B. App. lxxv.) is as follows :—

"ALLOWANCE TO WITNESSES.

	If resident in the Town in which the Cause is tried.	If resident at a Distance from the place of Trial.
	£ s. d.	£ s. d.
Common witnesses, such as labourers, journeymen, &c., per diem . . .	0 5 0	0 5 0 to 0 7 6
Master tradesmen, yeomen, and farmers, per diem . . . . . from	0 7 6 to 0 10 0	0 10 0 to 0 15 0
Auctioneers and accountants, per diem .	0 10 6 to 1 1 0	0 10 6 to 1 1 0
Professional men, per diem	1 1 0	

station in life of the witness, from 5s. to 3l. 3s. per day, exclusive of travelling expenses; and the witness is allowed for travelling whatever amount he has reasonably and actually paid, provided that it does not exceed 1s. per mile one way. If he attends in

	If resident in the Town in which the Cause is tried.	If resident at a Distance from the place of Trial.
	£ s. d.	£ s. d.
Professional men, inclusive of all, except travelling expenses, per diem	—	2 2 0 to 3 3 0
Attorneys', or other clerks, per diem	0 10 6	0 15 0 to 1 1 0
Engineers and surveyors, per diem	1 1 0	1 1 0 to 3 3 0
Notaries, per diem	1 1 0	1 1 0
Gentlemen Esquires Bankers Merchants	1 1 0 with subpœna, but no daily allowance except after the first day, and then a reasonable sum for refreshment and conveyance.	1 1 0 per diem.
Females, according to station in life, per diem from	0 5 0 to 0 10 0	0 5 0 to 1 0 0
Police inspector, per diem	0 5 0	0 7 6 to 0 10 0
Police constable	0 3 0	0 5 0 to 0 7 6

"If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only. The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 1s. per mile one way." See Griffin v. Hoskyns, 1 H. & N. 95, where a plaintiff, brought up by habeas corpus, had given evidence in two causes against the same defendant, and having succeeded in only one of them, was held to be entitled to a moiety of the costs of the habeas corpus.

more than one cause, he is only entitled to a proportionate part of the allowance in each cause. In the Court of Probate the scale of remuneration is not very different from that adopted in the Superior Courts of Common Law;[1] but in the County Courts it is considerably lower, ranging from 2s. to 1l. per day for the general expenses of the witness, while 6d. per mile one way is the maximum allowance for his travelling expenses.[2]

[1] The scale is as follows:—

"WITNESSES' EXPENSES.

"*Allowance to Witnesses, per day, including their board and lodging, as between party and party.*

	If resident within Five Miles of the General Post Office.			If beyond that distance.		
	£	s.	d.	£	s.	d.
Common witnesses, such as labourers, journeymen, &c.	0	5	0	0	7	6
Master tradesmen, yeomen, farmers, &c.	0	10	0	0	15	0
Auctioneers and accountants	1	1	0	2	2	0
Professional men, including notaries, engineers, surveyors, &c.	1	1	0	3	3	0
Clerks to attorneys or others	0	10	6	1	1	0
Esquires, bankers, merchants, and gentlemen	1	1	0	1	1	0
Females, according to station in life	0 5 0 to 0 10 0			0 7 6 to 1 0 0		
Police inspector	0	7	6	0	10	0
Police constable	0	5	0	0	7	6

"The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1s. per mile one way." It will be seen that the above scale is open to much comment. Oddly enough, the Rules which regulate the practice of the Court for Divorce and Matrimonial Causes, are silent on the subject of remuneration to witnesses.

[2] The following is the scale contained in the Sched. to the Rules:—

		Per Day.				
		s.	d.	£	s.	d.
"Gentlemen, merchants, bankers, and professional men	from	10	0 to	1	0	0
Tradesmen, auctioneers, accountants, clerks, and yeomen	from	5	0 to	0	10	0
Artisans and journeymen	from	3	0 to	0	5	0

§ 1127. Although the scale of allowance to witnesses, as fixed by the Common Law Judges, appears to have been framed solely with reference to persons who are subpœnaed to attend a trial at Nisi Prius, the taxing masters will occasionally be justified, under special circumstances, in allowing costs for the attendance of witnesses who have not been subpœnaed, or for the detention of witnesses beyond the actual period of the trial. For instance, if a foreign witness, who is not accessible by subpœna, but whose evidence is material in the cause, refuses to leave his home unless he be remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party;[1] and where the captain of a ship has been detained for a long time in this country in order to give evidence on a trial, large sums, calculated at a guinea a day, and amounting in the whole to above 100*l.*, have been allowed for his detention.[2] So,—although it is not a general rule, either that parties, if witnesses in their own favour, are to have an allowance

[1] Lonergan *v.* Roy. Ex. Ass., 7 Bing. 725; id. 729, S. C.; Tremain *v.* Barrett, 6 Taunt. 88; 1 Marsh. 463, S. C.

[2] Stewart *v.* Steele, 4 M. & Gr. 669; Mount *v.* Larkins, 8 Bing. 195; 1 M. & Sc. 357; 1 Dowl. 262, S. C.; Temperley *v.* Scott, 8 Bing. 392; 1 M. & Sc. 601, S. C.; Evans *v.* Watson, 3 Com. B. 327; Berry *v.* Pratt, 1 B. & C. 276.

		Per Day.					
		s.	*d.*		£	*s.*	*d.*
Labourers, and the like . . .	from	2	0	to	0	3	0

Travelling expenses, sum reasonably paid, but not more than sixpence per mile one way.

If the witnesses attend in more than one cause, they will be entitled to a proportionate part in each cause only."

The above scale is very injudiciously drawn up; for, first, by the adoption of a fluctuating amount of remuneration, it enables the Registrars, in taxing costs, to act with gross partiality,—it leads inevitably to the scandal of having different sums allowed in different courts,—and it neutralises the compulsory effect of a subpœna, unless the witness has been supplied with conduct-money calculated on the highest scale; next, it contains no reference to female witnesses; and, thirdly, in courts which were especially established to protect the rights of the poor, it precludes the poor man from securing the testimony of his rich neighbour on his behalf, except at a cost which it is quite out of his power to pay. The scale under the old County Court Rules, which awarded 7*s.* 6*d.* to gentlemen, &c., 5*s.* to tradesmen, &c., and 2*s.* to journeymen, &c., was incomparably better than the one now in force.

for their attendance at the trial, or that after a rule for a new trial has been obtained, witnesses may be detained at the cost of the losing party,—the Court, under very special circumstances, has allowed, in taxation of costs, subsistence money to a seafaring man, who was a necessary witness in his own cause, and who after having obtained a verdict, remained in England until a rule for a new trial, granted at the instance of his opponent, had been discharged.[1] Where no special circumstances intervene, the expenses of the attendance of witnesses on the commission day of the assizes will not be allowed as against the losing party on taxation of costs.[2]

§ 1128. No order has yet been issued by the Lord Chancellor with respect to the remuneration of witnesses in Courts of Equity; but it has been assumed, that the taxing officers of those courts ought to regulate the allowances upon the same basis as at common law;[3] and, in one case,[4] Vice-Chancellor Wood has gone so far as to hold that a medical witness, residing in London, was justified in refusing to give evidence before the Examiner, unless he was first paid for his attendance at the rate of a guinea a day.

§ 1129. The reasonable expenses of a witness ought to be tendered to him at the time when he is served with the subpœna,[5] or, at least, a reasonable time before the trial;[6] and even though he actually appears, he cannot be attached for declining to give evidence, unless these charges are paid or tendered.[7] He has, however, no right to refuse to be examined on the ground that the expenses incurred by him on former attendances have not been paid.[8] If the witness be a married woman, the money should, it

[1] Dowdell *v.* Australian Royal Mail Co., 3 E. & B. 902. See Howes *v.* Barber, 18 Q. B. 588. [2] Harvey *v.* Divers, 16 Com. B. 497.

[3] Clark *v.* Gill, 1 Kay & Johns. 22; Nokes *v.* Gibbon, 26 L. J., Ch., 208.

[4] Clark *v.* Gill, 1 Kay & Johns. 19. See also Brocas *v.* Lloyd, 23 Beav. 129. [5] Fuller *v.* Prentice, 1 H. Bl. 49.

[6] Horne *v.* Smith, 6 Taunt. 9; 1 Marsh. 410, S. C.; 13 East, 16, n. *a.*

[7] Bowles *v.* Johnson, 1 W. Bl. 36; Newton *v.* Harland, 1 M. & Gr. 956; 9 Dowl. 16, S. C.; Brocas *v.* Lloyd, 23 Beav. 129; 26 L. J., Ch. 758, S. C.

[8] Gaunt *v.* Johnson, 6 Beav. 551.

seems, be tendered to her, rather than to the husband;[1] and if a person be subpœnaed by both parties, he is entitled, before giving evidence, to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side.[2] Of course the witness may waive his right to demand the payment of his expenses, and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled,[3] or indirectly, by accompanying the parties to the place of trial without previously making any claim,[4] he will be liable to all the consequences of disobedience, should he subsequently refuse to appear as a witness.[5]

§ 1130. The law is not very clear as to what circumstances will justify a witness, who, in obedience to a subpœna, attends a trial in a civil cause, in bringing an action for his "costs and charges," and the following propositions are submitted with some hesitation. First, the witness can maintain such an action against the party to the suit who has subpœnaed him, if any express contract has been made upon the subject;[6] secondly, the better opinion seems to be, that the jury may reasonably infer a promise to pay from the mere fact of the attendance of the witness at the trial, and that where such an inference is drawn, the action can be supported by the implied contract;[7] thirdly, a witness cannot recover any larger amount than the sum specified in the scale of allowance as fixed by the judges, even though he rests his claim on an express promise;[8] and, lastly, no action can be brought by the witness against the attorney who subpœnaed him, on an implied

[1] Cro. El. 122; W. Jon. 430.

[2] Allen v. Yoxall, 1 C. & Kir. 315, per Rolfe, B.; Betteley v. M'Leod, 3 Bing. N. C. 405, 407; 5 Dowl. 481, S. C.

[3] Betteley v. M'Leod, 3 Bing. N. C. 405.

[4] Newton v. Harland, 1 M. & Gr. 956. In that case, the witness having accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, though she was held to be still entitled to claim her fair expenses for returning home.

[5] Goodwin v. West, Cro. Car. 522, 540.

[6] Hallet v. Mears, 13 East, 15; Goodwin v. West, Cro. Car. 522, 540.

[7] Pell v. Daubeny, 5 Ex. R. 955.

[8] Willis v. Peckham, 1 B. & B. 515; Collins v. Godefroy, 1 B. & Ad. 950.

contract to pay the expenses of attendance,[1] though probably the witness may succeed, if he can establish the fact of an express agreement having been made to that effect.[2]

§ 1130 A. It here deserves notice, that conduct money received by a witness with a subpœna may be recovered back by the party who paid it, as money had and received, where the attendance of the witness has become unnecessary, and no expenses have been incurred under the subpœna.[3]

§ 1131.[4] In *criminal cases, no tender of fees* is in general necessary, either on the part of the Crown or of the prisoner, in order to compel the attendance of the respective witnesses;[5] and this rule will prevail, though the indictment has been removed by certiorari, and is, consequently, tried in the Nisi Prius Court.[6] An exception, however, has been recognised by the Legislature in favour of those witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpœnas directing their attendance in another; and who are not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money, to defray their expenses in coming, attending, and returning, has been tendered to them.[7]

§ 1132. Although witnesses in Crown cases cannot, except under the circumstances just stated, claim, as a matter of right, the payment of their expenses, it being considered by the law to be the public duty of every citizen to obey a call of this description; yet, in order to encourage the due prosecution of offenders, the Legislature has authorised the Courts of Criminal Law to grant

[1] Robins *v.* Bridge, 3 M. & W. 114; Lee *v.* Everest, 2 H. & N. 285.

[2] Robins *v.* Bridge, 3 M. & W. 114, and cases there cited. Also Lee *v.* Everest, 2 H. & N. 285, 292, per Bramwell, B.

[3] Martin *v.* Andrews, 26 L. J., Q. B., 39; 7 E. & B. 1, S. C.

[4] Gr. Ev., § 311, as to first three lines.

[5] Pell *v.* Daubeny, 5 Ex. R. 957, per Parke and Alderson, Bs.; per Bayley, J., cited 2 Russ. C. & M. 948, n. *a*; R. *v.* Cousens, id. per Wightman, J.; R. *v.* Cooke, 1 C. & P. 322, per Parke, J., and Garrow, B.

[6] R. *v.* Cooke, 1 C. & P. 322. See post, § 1134.

[7] 45 Geo. 3, c. 92, § 4.

to those prosecutors and witnesses who attend on recognisance[1] or subpœna,[2] such costs as will reimburse them for the expenses they have incurred, or shall incur,[3] in all cases of felony,[4] excepting those offences which are declared felonies under the

[1] A party will be entitled to his expenses under this term, though he has been bound over to prosecute by the Quarter Sessions, R. *v.* Paine, 7 C. & P. 136.

[2] The expenses of a prosecutor, whose name is included in a subpœna, are not confined, under this term, to his costs as a witness only, though he has not been bound over by the magistrate to prosecute, R. *v.* Sheering, 7 C. & P. 440, by all the judges. See R. *v.* Jeyes, 3 A. & E. 416.

[3] The judge, who reserves a case for the opinion of the Court for the consideration of Crown cases, may allow the prosecutor the costs he will incur in arguing such case ; and the officer of the court above will tax and ascertain such costs, and certify the amount to the officer of the court below, R. *v.* Lewis, 1 Dear. & Bell, 326 ; R. *v.* Cluderoy, 3 C. & Kir. 205.

[4] 7 Geo. 4, c. 64, § 22, enacts, that "the Court before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of the prosecutor or of any other person, who shall appear on recognisance or subpœna to prosecute or give evidence against any person accused of *any felony*, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution ; and also to compensate them for their trouble and loss of time therein ; and, although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall, in the opinion of the Court, bonâ fide have attended the court in obedience to any such recognisance or subpœna, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient, to reimburse such person for the expenses which he or she shall have bonâ fide incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognisance or subpœna ; and also to compensate such person for trouble and loss of time ; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same ; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned." See 6 & 7 Will. 4, c. 116, § 105, Ir. ; and 7 & 8 Vict., c. 106, § 40, Ir.

Act passed in the year 1848, for the better security of the Crown and Government.[1]

§ 1133. Similar powers of awarding costs are also conferred on the Courts, when offenders are prosecuted for any of the following *misdemeanors:* an attempt to commit felony;[2] an assault with

[1] 11 & 12 Vict., c. 12, § 10, enacts, that "it shall not be lawful for any Court, before which any person shall be prosecuted or tried for any felony under this Act, to order payment to the prosecutor or the witnesses of any costs which shall be incurred in preferring or prosecuting any such indictment."

[2] 7 Geo. 4, c. 64, § 23, after reciting that "for want of power in the Court to order payment of the expenses of any prosecution for a *misdemeanor*, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanors, who thereby escape the punishment due to their offences;" for remedy thereof, enacts, that "where any prosecutor or other person shall appear before any court, on recognisance or subpœna, to prosecute or give evidence against any person indicted of *any assault with intent to commit felony, of any attempt to commit felony, or any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, or of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, or wilful and corrupt perjury, or of subornation of perjury,* every such Court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have bonâ fide attended the court in obedience to any such recognisance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony." This section originally contained a proviso, "that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate;" but that proviso is now repealed by § 1 of 14 & 15 Vict., c. 55. §§ 24 & 25 of 7 Geo. 4, c. 64, further provide, that the order for payment shall be made out by the proper officer of the court, and that the money shall be paid by the treasurer of the county, &c., or by such other person as is mentioned in the Act. If the treasurer refuses to pay the expenses in obedience to the order, the remedy is by indictment, and not by mandamus, R. *v.* Jeyes, 3 A. & E. 416. See 5 A. & E. 812, n.; but to render the treasurer liable to prosecution, the entire order of the Court must be served upon him; and therefore,

intent to commit felony;[1] an assault upon a peace officer in the execution of his duty, or upon any person acting in his aid;[2] an assault in pursuance of any conspiracy to raise the rate of wages;[3] any assault brought before justices for summary conviction, which they consider to be a fit subject for prosecution by indictment;[4] the receiving stolen property, knowing it to have been stolen;[5] riot;[6] perjury;[7] subornation of perjury;[8] neglect or breach of duty as a peace officer;[9] obtaining property by false pretences;[10] wilful and indecent exposure of the person;[11] endeavouring to conceal the birth of a child;[12] carnal knowledge of girls between

where the order was to pay an aggregate sum, the details being annexed, and the attorney tore off the paper containing the details, it was held that the treasurer was justified in refusing to pay, R. *v.* Jones, 2 Moo. C. C. 171; 9 C. & P. 401, S. C. § 27 of the Act provides for the payment of the expenses of prosecutions in the Court of Admiralty. The stat. 4 & 5 Will. 4. c. 36, § 12, enacts that any two judges of the Central Criminal Court may order the costs of prosecutors and witnesses to be paid by the treasurer of the county in which, but for that Act, the offender would have been tried. See 7 & 8 Vict., c. 106, § 40, as to what remuneration will be allowed to prosecutors and witnesses attending the trial of misdemeanors in the county of Dublin.

[1] 7 Geo. 4, c. 64, § 23. [2] Id. [3] Id.

[4] 14 & 15 Vict., c. 55, § 3, enacts, that "in every case of assault brought before justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognisance to prosecute and give evidence at the assizes or sessions of the peace, every such Court is hereby authorised and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such Court under such recognisance, together with compensation for their trouble and loss of time, in the same manner as courts are authorised and empowered to order the same in cases of felony."

[5] 7 Geo. 4, c. 64, § 23, cited ante, p. 1004, n. 2.

[6] Id. [7] Id. [8] Id. [9] Id. [10] Id.

[11] Id. An assault with intent to incite to an unnatural crime, though the indictment allege an indecent, but not public, exposure, is not an offence within these words, and, therefore, where a rule was made to pay the prosecutor his expenses, the Court, on motion, set it aside. R. *v.* ——, 8 A. & E. 589; 3 N. & P. 627, S. C.

[12] 7 Will. 4 & 1 Vict., c. 44, enacts, that "where any prosecutor or other person shall appear before any Court, on recognisance or subpœna, to prosecute or give evidence against any person upon any charge of having *endeavoured to conceal the birth of any child*, every such Court is hereby authorised and empowered, whether any bill of indictment for such

the ages of ten and twelve;[1] taking or causing to be taken any unmarried girl under the age of sixteen years from her father, mother, or guardian;[2] committing any offence against the Act passed in 1849, to protect women from fraudulent practices for procuring their defilement;[3] conspiring to charge any person with felony, or to indict him for felony;[4] conspiring to commit any felony;[5] and all misdemeanors under the Merchant Shipping Act, 1854,[6] or the Fraudulent Trustee Act of 1857.[7]

§ 1134. The Acts which authorise the awarding of costs to

charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are now by law authorised and empowered to order the same in cases of prosecutions for felony."

[1] 14 & 15 Vict., c. 55, § 2, extends the power of allowing costs to cases where parties are indicted for "unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony."

[2] Id.

[3] 12 & 13 Vict., c. 76, enacts in § 2, that "where any prosecutor or other person shall appear before any Court on recognisance to prosecute or give evidence against any person charged with any offence against this Act, every such Court is hereby authorised and empowered, whether any bill of indictment for such charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, in the same manner as courts are now by law authorised and empowered to order the same in cases of prosecutions for felony."

[4] 14 & 15 Vict., c. 55, § 2, cited above, n. 1.

[5] Id.

[6] 17 & 18 Vict., c. 104, § 518, enacts, that "every offence by this Act declared to be a misdemeanor shall be punishable by fine or imprisonment, with or without hard labour; and the Court before which such offence is tried may, in England, make the same allowances and order payment of the same costs and expenses, as if such misdemeanor had been enumerated in the Act passed in the seventh year of his late Majesty King George the Fourth, chapter sixty-four, or any other Act that may be passed for the like purpose; and may in any other part of her Majesty's dominions make such allowances and order payment of such costs and expenses (if any) as are payable or allowable upon the trial of any misdemeanor under any existing Act or ordinance, or as may be payable or allowable under any Act or law for the time being in force therein."

[7] 20 & 21 Vict., c. 54, § 15.

prosecutors and witnesses in criminal trials, do not apply to cases where the indictment has been removed into the Court of Queen's Bench by certiorari;[1] and no distinction appears to be recognised in this respect between a removal by the prosecutor and a removal by the defendant.[2] Where the Acts do apply, all extra expenses incurred in getting up a prosecution may be reimbursed, *except* the attendance of witnesses before the *coroner*.[3] Thus, where a witness, in consequence of being taken ill during his attendance at the trial, was put to some extra charges, these have been awarded to him;[4] and the costs of an argument before the Court of Criminal Appeal have been allowed.[5] Expenses have also been allowed to the prosecutor and witnesses, though the prisoner did not reach the assize town till the grand jury had been discharged;[6] though the accused, who had not been apprehended, and was under no recognisance, did not appear to take his trial;[7] though the prisoner had been apprehended under a bench-warrant, and the prosecutor and witnesses were under no recognisances, and only one of them had been subpœnaed;[8] and though the accused was not forthcoming, having been, through some mistake, discharged by proclamation at a preceding sessions.[9] In this last case the witnesses had been bound over to appear, and a true bill had been actually found.[10]

§ 1134 A. In August, 1851, the Secretary of State for the Home Department was authorised to make regulations with respect to

[1] R. v. Kelsey, 1 Dowl. 481; R. v. Richards, 8 B. & C. 420: R. v. Johnson, 1 Moo. C. C. 173; R. v. Jeyes, 3 A. & E. 419, per Littledale, J. See ante, § 1131.

[2] R. v. Treasurer of Exeter, 5 M. & R. 167, per Littledale, J., sed qu.; and see 8 A. & E. 590.

[3] R. v. Lewen, 2 Lew. C. C. 161, per Lord Denman R. v. Rees, 5 C. & P. 302, per Littledale, J.; R. v. Taylor, id. 301, per id.

[4] In re Mallison, 1 Lew. C. C. 132, per Patteson, J.; Anon., id. 133, per Parke, J.

[5] R. v. Cluderoy, 3 C. & Kir. 205; R. v. Lewis, 1 Dear. & Bell, 326; 7 Cox, C. C. 406, S. C. See ante, p. 1003, n. 3.

[6] Anon., 1 Lew. C. C. 128, per Hullock, B.

[7] Flannery's case, 1 Lew. C. C. 133, per Alderson, B.; Anon., id. 134, per Gurney, B.

[8] R. v. Butterwick, 2 M. & Rob. 196, per Parke, B.

[9] R. v. Robey, 5 C. & P. 552, per Taunton, J.

[10] Id.

the amount of costs to be allowed to prosecutors and witnesses in the criminal cases above stated;[1] but, in the ordinary spirit of official procrastination, the rules on the subject were not promulgated till the 9th of February, 1858.[2]

[1] 14 & 15 Vict., c. 55, §§ 4, 5, 6, repealing 7 Geo. 4, c. 64, § 26.

[2] The rules are as follows:—

"Whereas it is expedient to make regulations as to the rates and scales of payment according to which costs, expenses, and compensations shall be allowed and ordered to be paid under the Act of 7 Geo. IV., c. 64, and divers other Acts of Parliament authorising such payments to prosecutors and witnesses, and to persons attending courts in obedience to recognisances or subpœnas in the cases of criminal prosecutions, for their travelling expenses and trouble and loss of time incurred in attending such courts, and also to make regulations as to the rates and scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the travelling expenses of prosecutors, and witnesses for the prosecution and other persons, of attending before such magistrate or magistrates, and of compensation for trouble and loss of time therein in the cases aforesaid: And whereas to the end aforesaid it has become necessary to revoke divers regulations made under § 26 of the said Act hereinbefore recited; Now I, the Right Honourable Sir George Grey, acting under and in pursuance of the Act of 14 & 15 Vict., c. 55, do revoke, annul, and make void, all rules and regulations made under the said 26th section of the said Act, whereby any costs, expenses, and compensations may be allowed or ordered to be paid to such prosecutors and witnesses, or other persons attending on recognisance or subpœna, for their travelling expenses, trouble, and loss of time in attending before such Courts or before such examining magistrate or magistrates, to a larger or greater amount than the allowances hereinafter authorised to be made in that behalf: and I do make, constitute, and appoint the following rules and regulations to be observed by all Courts and magistrates, and the officers and clerks of such Courts and magistrates, and by all others whom it may concern, as to the rates and scales of payment of such costs, expenses, and compensation: and I do direct that the same shall take effect and be in force in all places where the same may be capable of taking effect; that is to say—

1. I do make, constitute and appoint the following rules and regulations as to the rates and scales of payment according to which such certificates may be granted, by such *examining magistrate* or magistrates in respect of the travelling expenses of prosecutors, and witnesses for the prosecution, of attending before such magistrate or magistrates, and of compensation for their trouble and loss of time therein in the cases aforesaid, namely:—

	£	s.	d.
There may be allowed to prosecutors or witnesses being *members of the profession of the law or of medicine*, if resident in the city, borough, parish, town, or place where the examination is			

§ 1135. Independent of the Home Office Regulations,—which

	£	s.	d.
taken, or within a distance not exceeding two miles from such place, for their loss of time and trouble in attending to give professional evidence on such examination, but not otherwise, a sum, in the discretion of the magistrate or magistrates, for each attendance not to exceed	0	10	6
If such prosecutor or witness shall reside elsewhere, then a sum for the same not to exceed	1	1	0
And for mileage, a sum not to exceed 3*d.* per mile each way.			
To prosecutors and witnesses, being *constables* attending the bench of magistrates where such examination is taken on any police duty, and to constables paid by salary, and attending from a distance not exceeding three miles, there shall be allowed	Nil.		
Unless the magistrate or magistrates shall certify that there were special reasons for making an allowance, and shall specify such reasons upon his or their certificate, and then a sum not to exceed for each day	0	1	0
To prosecutors and witnesses being constables paid by salary, and not attending the magistrate or bench of magistrates on any police duty, for their trouble in attending such examination, from a distance greater than three miles, and not exceeding seven miles from the place where the examination is taken, a sum not to exceed for each day	0	1	0
To the same if attending from a distance greater than seven miles from the place where the examination is taken, a sum not to exceed for each day	0	1	6
To prosecutors and witnesses being constables paid by salary, if necessarily detained all night for the purposes of the examination, a sum for the night, not to exceed	0	2	0
The said allowances to prosecutors and witnesses being constables paid by salary, are to be conditional, upon the same being applicable for their personal benefit.			
To prosecutors and witnesses being constables necessarily travelling to the place of examination in discharge of any police duty, there shall be allowed for mileage	Nil.		
Unless the examining magistrate or magistrates shall certify that there were special reasons for making an allowance, and shall specify the same upon their certificates, and then the same as other constables.			
To prosecutors and witnesses being constables not attending the place of examination in discharge of a police duty, and entitled to be conveyed under 7 & 8 Vict., c. 85, § 12, and able to travel by railway, there shall be allowed mileage as follows :—			
To superintendents, inspectors, serjeants, and constables,			

are cited below, and which, it must be admitted, are more remark-

	£	s.	d.
the lowest amount per mile authorised by Act of Parliament for their conveyance, and no larger sum ;			
To prosecutors and witnesses being constables able but not so entitled to travel, and not attending the place of examination on any police duty, there shall be allowed for mileage railway fare the same as to ordinary witnesses ;			
To prosecutors and witnesses being constables not able to travel by railway, and not attending the magistrate or magistrates on any police duty, for every mile beyond four miles each way they shall travel to reach the place of examination, a sum not to exceed each way, 2*d.* ;			
To prosecutors and witnesses being constables, able partially to travel by railway, for every mile after the first four miles each way, in reaching such means of conveyance, a sum not to exceed 2*d.*, and railway fare as other constables.			
To *prosecutors and witnesses* not hereinbefore provided for, resident in the city, borough, parish, town, or place where the examination is taken, or within a distance not exceeding two miles from such place, for their trouble and loss of time in so attending, there shall be allowed a sum for each day not to exceed	0	1	0
If resident elsewhere and beyond the distance of two miles, or if such prosecutors or witnesses shall be necessarily detained from home, for the purpose of the examination, more than four hours, a sum, at the like discretion, not to exceed . . .	0	1	6
If they shall be necessarily detained from home more than six hours, then a sum, at the like discretion, not to exceed .	0	2	6
When he or they shall reside at such a distance from the place of examination as to render it necessary that he or they shall sleep from home, then, at the like discretion, a sum for the night not to exceed	0	2	6
There may be allowed for mileage as follows :—			
If the prosecutor or witness reside at a greater distance than two miles from the place of examination, and the whole or any portion of the journey can be performed by railway, second-class fare for such whole or portion of the journey, as the case may be, and for a journey, or part of a journey, performed otherwise than by railway, a sum not to exceed per mile each way	0	0	3

In pursuance of the power in me vested, I do make the following rules and regulations as to the rates and scales of payment of costs, expenses, and compensations to be allowed, or ordered to be paid, under the said Act of 7 Geo.

able for their elaborate minuteness than for their liberality or

4, c. 64, and other the Acts of Parliament aforesaid, to prosecutors and witnesses attending *courts of assize, oyer and terminer, gaol delivery, general session of the peace*, or any other courts having power to allow such costs, expenses, and compensations to prosecutors and witnesses, and persons attending such courts, in obedience to any recognisance or subpœna in cases of criminal prosecutions, for their trouble, loss of time, and travelling expenses in so attending.

For the purposes aforesaid I do make, constitute and appoint the following rules and regulations ; that is to say, there may be allowed :—

			d.
To prosecutors and witnesses being *members of the profession of the law or of medicine*, attending to give professional evidence, but not otherwise, for their trouble, expenses, and loss of time, for each day they shall necessarily attend the court to give professional evidence, a sum not to exceed	1	1	0
For each night, the same as ordinary witnesses, and for mileage a sum not to exceed, per mile each way	0	0	3
To prosecutors and witnesses, being *constables* and paid by salary, if resident in the city, borough, town or place where such court is held, or within a distance not exceeding two miles of such place, a sum, in the discretion of the Court, not to exceed for each day	0	1	0
If resident elsewhere, and if they shall attend from a greater distance than two miles, a sum, in the discretion of the Court, for each day not to exceed	0	1	6
To the same, if they shall be necessarily detained all night for the purposes of the prosecution, a further sum for the night not to exceed	0	2	0

If such prosecutors and witnesses shall be chief constables or superintendents attending from a distance greater than three miles, and they shall be necessarily detained all night for the purposes of the prosecution, instead of the foregoing allowances there may be allowed to them the same as ordinary witnesses.

The said allowances to prosecutors and witnesses, being constables paid by salary, are to be conditional on the same being applicable to their personal benefit.

To prosecutors and witnesses, being constables who shall be entitled to be conveyed under the 7 & 8 Vict., c. 85, § 12, and able to travel by railway, there may be allowed for mileage as follows :—

To superintendents, inspectors, serjeants, and police constables, the lowest amount per mile authorised by Act of Parliament for their conveyance, and no larger sum ;

To prosecutors and witnesses, being constables not so entitled

enlightened policy,—in some grave cases of felony,[1] as, for instance,

[1] 14 & 15 Vict., c. 55, § 7, provides that "nothing in this Act or in any regulations under this Act, shall interfere with or affect the power of any Court to order payment to any person who may appear to such Court to have shown extraordinary courage, diligence, or exertion, in, or towards any such apprehension as hereinbefore mentioned, of such sum as such Court shall think reasonable, and adjudge to be paid, in respect of such extraordinary courage, diligence, or exertion."

	£		d.
to travel, there may be allowed railway fare the same as to ordinary witnesses ;			
To the same if paid by salary, and where they are not able to travel by railway, for every mile beyond four miles each way they shall travel to and return from the court where the prosecution takes place, a sum not to exceed 2*d.*			
To the same if paid by salary, when able partially to travel by railway, for every mile after the first four miles each way in reaching such means of conveyance, a sum not to exceed 2*d.*, and railway fare as other constables.			
To *prosecutors and witnesses* not hereinbefore provided for, there may be allowed, for their expenses, trouble, and loss of time in attending the court where the prosecution takes place, per day, a sum not to exceed	0	3	6
To the same, if entitled to mileage, for each night they may be necessarily detained from home for the purposes of the prosecution at any assizes, session of goal delivery, or session of oyer and terminer, a sum not to exceed	0	2	6
To the same for each night they may necessarily be detained from home for the purposes of the prosecution at the session of the peace	0	2	0
To the same for mileage there may be allowed as follows :—			
If resident more than two miles from the court where the prosecution takes place, if the whole or any portion of the journey can be performed by railway, second-class fare for such whole or portion of the journey, as the case may be, and for a journey or part of a journey performed otherwise than by railway, per mile, each way, a sum not to exceed	0	0	3

In computing the amount to be allowed for mileage under any of the regulations herein contained, I do direct that no greater allowance be made than at the rate of 3*d.* per mile each way by the nearest available route.

I also direct that no prosecutor or witness allowed for mileage under any of the regulations herein contained, shall be allowed for loss of time occasioned by his or her omission to avail himself or herself of a public conveyance, if available.

where persons are charged, either as principals or as accessories

I further direct that no prosecutor or witness be allowed, under any of the regulations aforesaid, for his attendance, loss of time, trouble, or expenses, in *more than one case* on the same day.

I further direct that no constable paid by salary be allowed for railway-fare not actually paid.

EXCEPTIONS.

I do authorise payment to the officer of a gaol whose duties require his attendance in the court where the prosecution takes place, for giving evidence on a former conviction, a sum not to exceed 3*s.* 6*d*.

I do make the following regulations as to the compensation to be allowed in the cases of prisoners brought by writ of *habeas corpus*, or other lawful process, to give evidence for the prosecution.

To *governors* and *officers of gaols*, in whose custody the prisoner is brought as follows :—

	£		d.
To a governor, for his loss of time, trouble and expenses, in bringing up such prisoner, for each day he may attend, the sum of	0	12	0
To other officers, for the same, the sum of	0	6	0
And for mileage, a sum, in the discretion of the Court, not to exceed per mile each way	0	1	0

Provided always, that the above allowances shall not be made to any gaoler or officer charged with the custody of prisoners for trial, at the place where such prisoner shall be required to give evidence, in respect of the time such gaoler or officer shall, by virtue of his office, be required to be there present.

I authorise the following payments to be made to *attorneys* for the prosecution, *giving evidence*, over and above the allowances so made to them as attorneys :—

	£	s.	d.
Such attorneys may be allowed a sum not exceeding . . .	0	6	8
if, in the opinion of the proper officer of the court, such evidence was necessary, and saved the attendance of another witness.			

And whereas it may become necessary, in certain cases, that *scientific persons*, unacquainted with the facts to be given in evidence upon the prosecution, may be required to attend as witnesses, in order to state their opinion on matters of science in issue on such prosecutions, and it is reasonable in such cases that the foregoing rates of allowance should be departed from, I hereby direct that the allowances to be made to such persons shall be subject to the decision of the Court before whom such persons may be examined, which may direct such allowances as to such Court may appear reasonable.

Whenever an *interpreter* shall be employed to interpret, on the part of the prosecution, it shall be competent for the Court before whom such interpreters shall be so employed to make him such allowances as to such Court shall seem reasonable : provided always that this regulation is not to interfere with

before the fact, with any of the following crimes:—viz.: murder;[1]

any regulations in force, where such now exist, for the remuneration of interpreters.

In case of the *illness* or inability of any prosecutor or witness to travel without some special means of conveyance, it shall be lawful for the Court to depart from the foregoing rates of allowances, and to make such other allowances as the justice of the case shall require.

Under the circumstances herein specified under the head of exceptions, I authorise a departure from the rules and regulations herein contained, as well by the examining magistrate or magistrates as by the courts herein mentioned, except only in the case of an attorney for the prosecution giving evidence: provided always that whenever any allowances, hereinbefore authorised under the head of exceptions, shall have been made, the circumstances under which the general rate of allowances shall be departed from shall in all cases be fully specified by the proper officer of the court, or magistrate, upon the document by which such allowances shall be authorised. And, lastly, I do order that, notwithstanding anything herein contained, all lawful rules and regulations heretofore made and in force, under or by reason whereof allowances to a *less* amount than those hereby authorised are now payable in the cases hereinbefore provided for, shall be and remain in as full force and effect as if this order had not been made, and shall continue to apply to the persons and the circumstances thereby provided for, although such persons and circumstances may be comprehended within the terms hereof, and that the said rules and regulations shall so far remain unaffected by this order, and that nothing herein contained shall have the effect of increasing the amount of any rates or allowances which may be lawfully made under such rules and regulations; it being the true intent and meaning hereof that such rules and regulations shall be and remain unaltered, further or otherwise than in the reduction of allowances to prosecutors and witnesses where the rates thereof shall be in excess of those herein contained.

Given under my hand at Whitehall, the 9th of February, 1858.

(Signed) G. GREY."

[1] 7 Geo. 4, 64, § 28, enacts, that "where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with *murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at, any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen*, every such Court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county

attempting to murder;[1] stabbing, cutting, or poisoning;[2] shooting at any one, or attempting to discharge loaded fire arms at him;[3] administering anything to a woman to procure her miscarriage;[4] rape;[5] housebreaking;[6] robbery;[7] arson;[8] horse stealing,[9] bullock stealing, or sheep stealing;[10] and receiving stolen property knowing it to have been stolen;[11]—the Courts,

in which the offence shall have been committed, to pay to the person or persons who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time, in or towards such apprehension; and where any person shall appear to *any court of sessions of the peace* to have been active in or towards the apprehension of any party, charged with *receiving stolen property* knowing the same to have been stolen, such Court shall have the power to order compensation to such person in the same manner as the other Courts hereinbefore mentioned: Provided always, that nothing herein contained shall prevent any of the said Courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this Act empowered to allow to prosecutors and witnesses respectively." § 29 provides that the sheriff shall pay the amount awarded, and shall be repaid by her Majesty's treasury; and § 30 enacts, that if any man shall be killed in endeavouring to apprehend any person charged with any of the offences mentioned in § 28, the Court may order the sheriff to pay to his widow, child, father or mother, such sum as in its discretion shall seem meet.

[1] This offence, though not mentioned in the statute, has been held to be within the spirit of the enactment, and extra expenses incurred in apprehending a prisoner, who was charged with attempting to murder by suffocation, have been allowed, R. *v.* Durkin, 2 Lew. C. C. 163, per Patteson, J.

[2] 7 Geo. 4, c. 64, § 28, cited ante, p, 1014, n. 1.

[3] Id.

[4] Id.

[5] Id.

[6] Id. This term, it seems, does not include the crime of sacrilege, R. *v.* Robinson, 1 Lew. C. C. 129, per Hullock, Bolland, and Parke, Bs.

[7] Id.

[8] Id.

[9] This word describes a *class* of offences, and includes the crime of stealing cows, heifers, &c., R. *v.* Gillbrass, 7 C. & P. 444.

[10] 7 Geo. 4, c. 64, § 28, cited ante, p. 1014, n. 1.

[11] Id. See also 5 Geo. 4, c. 84, § 22, which provides, that "whoever shall discover and prosecute to conviction any offender" being unduly at large within the kingdom, before the expiration of his sentence of transportation or banishment, "shall be entitled to a reward of 20*l.* for every such offender so convicted;" and, though no provision is made in the Act for the mode of recovering the reward, the judges have held that the presiding judge at the trial has power to make an order for its payment on the county treasurer. R. *v.* Emmons, 2 M. & Rob. 279; R. *v.* Ambury, 6 Cox,

whether of oyer and terminer and gaol delivery, or of sessions of the peace,[1] are empowered to order that any persons who have been especially active in apprehending the offenders, shall be paid some additional remuneration for their expenses,[2] exertions,[3] and loss of time. The recent Act of 18 & 19 Vict., c. 126, which empowers justices in petty sessions to dispose of petty larcenies in a summary way, provides in § 14 that, subject to the Home Office regulations, such justices may, if they think fit, order payment of the expenses of the prosecutors and witnesses.

§ 1136. In all criminal cases, the prisoner is entitled, both in this country and in America, to have compulsory process for obtaining witnesses in his favour;[4] but, to the disgrace of our penal laws it must be stated, that no provision has yet been made for reimbursing such witnesses their reasonable expenses, however necessary their attendance may be at the trial, in order to

Cr. Cas. 79, per Williams, J. See the Irish Acts of 6 & 7 Will. 4, c. 116, §§ 106, 107; and 7 & 8 Vict., c. 106; §§ 41, 42.

[1] 14 & 15 Vict., c. 55, § 8, enacts, that "when any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned," (that is, in § 28 of 7 Geo. 4, c. 64), "which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

[2] The judge has no power, as it seems, to order the payment of expenses incurred in apprehending a prisoner out of England, R. v. Barrett, 6 Cox, C. C. 78, per Williams, J. The Secretary of State must, in such case, be memorialised; id.

[3] Under this word, a gratuity may be awarded to a prosecutor for his courage in apprehending the prisoner, R. v. Womersly, 2 Lew. C. C. 162, per Parke, B.; though he has not been put to any expense, R. v. Barnes, 7 C. & P. 166. If the facts do not appear in evidence, the judge will require them to be laid before him on affidavit, R. v. Jones, id. 167, per Park, J.

[4] 2 Hawk. P. C. c. 46, §§ 170, 172; 2 Ph. Ev. 378; 2 Russ. C. & M. 947; Const. U. Amendm. Art. 6.

establish the innocence of the accused.* The nearest approach to justice which is at present vouchsafed to prisoners, only extends thus far; that if the constable, as is generally the case, has taken possession of the property found on their persons, the Court, on application, will, for the purposes of their defence, order to be restored to them that portion of it which is not required as an instrument of proof at the trial, or which does not fairly appear to be the produce of the crime with which they stand charged.[1]

§ 1137. As writs of subpœna have no force, at common law, beyond the jurisdictional limits of the court from which they issue, it is obvious that, in order to secure the due administration of justice, additional powers were required to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part. The aid of the Legislature was therefore invoked in the year 1805, and an Act[2] was passed supplying a partial remedy for the evil, that is, a remedy which only extended to criminal prosecutions. This statute provides in substance, that the service of a subpœna or other process upon any person in one part of the United Kingdom, requiring his appearance to give evidence in any *criminal prosecution* in another part, shall be as effectual as if the process had been served in that part where the witness is required to appear. If the person served does not appear, the Court out of which the process issued may, upon proof of service, transmit a certificate of the default, under the seal of the Court, or under the hand of one of the judges, to the Court of Queen's Bench in England or Ireland, or to the Court of Justiciary in Scotland, according as the writ may have been served in one or other of these parts of the kingdom; and such Courts respectively, on proof that a reasonable sum was tendered to the witness for his expenses, may punish him for his default, in like manner as if he had refused to appear in obedience to process issuing out of these respective courts.

[1] R. v. Barnett, 3 C. & P. 600; R. v. Jones, 6 id. 343; R. v. O'Donnell, 7 id. 138; R. v. Kinsey, id. 447; R. v. Burgiss, id. 488; R. v. Rooney, id. 515; R. v. Frost, 9 id. 131.

[2] 45 Geo. 3, c. 92, §§ 3, 4.

§ 1138. Matters remained in this state for nearly half a century, when Parliament again interposed, and a further instalment of legal reform was embodied in the Act of 17 & 18 Vict., c. 34. This statute enacts as follows:—"I. If in any action or suit now or at any time hereafter depending in any of her Majesty's Superior Courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the Court in which such action is pending, or if such Court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness, who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of subpœna ad testificandum, or of subpœna duces tecum, or warrant of citation, shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the Court from which it issues. II. Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the Court or Judge, as the case may be; and no such writ shall issue without such special order. III. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the Court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said Court, to transmit a certificate of such default, under the seal of the same Court, or under the hand of one of the judges or justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or in case such service was had in Scotland, to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland, to any of her Majesty's Superior Courts of Common Law at Dublin; and the Court to which such certificate is so sent, shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in

obedience to a writ of subpœna or other process issued out of such last-mentioned Court. IV. None of the said Courts shall in any case proceed against or punish any person, for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process issued under the powers given by this Act, unless it shall be made to appear to such Court, that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person. V. Nothing herein contained shall alter or affect the power of any of such Courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission. VI. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court, but the admissibility of all such evidence shall be determined as if this Act had not passed."

§ 1139. It would be difficult to find a satisfactory reason for not conferring the salutary powers just cited on the Courts of Equity, the Judicial Committee of the Privy Council, the Court of Probate,[1] the Court of Admiralty, the Bankruptcy Court, the Insolvent Debtors' Court, and the Ecclesiastical Courts.[2] All these tribunals are now authorised to examine witnesses vivâ voce, if they think fit,[3] and the matters over which they respectively have cognisance are often quite as important as those that are litigated before the Superior Courts of Common Law. In the United States, Courts sitting in any district are empowered by statute to

[1] Similar powers are granted to the Court for Divorce and Matrimonial Causes, see post, § 1163 B.

[2] In the counties bordering on Scotland, the want of such a power as is stated in the text, is much felt in the County Courts.

[3] See, as to Courts of Equity, 15 & 16 Vict., c. 86, § 39; as to the Judicial Committee of the Privy Council, 3 & 4 Will. 4, c, 41, § 7; as to the Court of Probate, 20 & 21 Vict., c. 77, §§ 24, 31; as to the Court of Admiralty, 3 & 4 Vict., c. 65, § 7; and as to the Ecclesiastical Courts, 17 & 18 Vict., c. 47.

send subpœnas for witnesses into any other district, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial.[1]

§ 1140. Another manifest improvement in the administration of justice which is much called for, is to empower all inferior courts of record to issue subpœnas into any part of England. At present, such Courts, though authorised to issue subpœnas, can only in general[2] do so within their own jurisdiction. Subpœnas, therefore, which are granted by the clerk of assize or clerk of the peace are not compulsory except within a single county or other more limited district; and the consequence is, that if a necessary but unwilling witness happens to live, as he often does, beyond these limits, application must be made, at the cost of much time and trouble, to the Crown Office, whence subpœnas may issue to any place within the jurisdiction of the Court of Queen's Bench.[3]

§ 1141.[4] If a witness, having been duly served with a subpœna, wilfully neglects to appear, he is guilty of *contempt* of Court, and may be proceeded against by *attachment.* In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he would not have been forthcoming when required to give evidence. The jury need not be sworn; and it is no longer necessary even that the witness should be called upon his subpœna before withdrawing the record. This last form is, indeed, usually followed, and the practice is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. Still, it is not essential; and in some cases, as if the witness had left England two days before the trial, it would be merely an idle ceremony.[5]

[1] Stat. 1793, ch. 66 [22], § 6; 1 L. L., U. S., p. 312, Story's ed.
[2] See post, § 1177, as to the County Courts.
[3] Corner's Cr. Pr. 256, 257; Crown Cir. Comp. 9, 21. See post, § 1144.
[4] Gr. Ev., § 319, in some part.
[5] Lamont *v.* Crook, 6 M. & W. 615; Barrow *v.* Humphreys, 3 B. & A.

§ 1142.[1] As an attachment for contempt does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court,[2] the case must be perfectly clear, to justify the exercise of this extraordinary jurisdiction.[3] The motion for an attachment should therefore be brought forward as soon as possible,[4] and the party applying must show by affidavit that a copy of the subpœna was seasonably and personally served on the witness,[5] that at the time of such service the original writ was shown to him,[6] that his fees, if he were entitled to them, were paid or tendered,[7] or the tender expressly waived,[8] and, in short, that everything has been done which was necessary to secure his attendance.[9] It must also appear from the affidavits, that the absence of the witness was an intentional defiance of the process of the Court;[10] but if this be clearly shown, the witness, as it seems, cannot justify his conduct by proving that his evidence was immaterial.[11]

§ 1143. The fact, however, of immateriality is sometimes

598; Dixon v. Lee, 1 C. M. & R. 645; Mullett v. Hunt, 1 Cr. & M. 752; Goff v. Mills, 2 Dowl. & L. 23, per Wightman, J. These cases overrule Malcolm v. Ray, 3 Moore, 222, and Bland v. Swafford, Pea. R. 60; and resolve the doubt expressed in R. v. Stretch, 4 Dowl. 30; 3 A. & E. 503, S. C.

[1] Gr. Ev., § 319, in part.

[2] Barrow v. Humphreys, 3 B. & A. 600, per Best, J.

[3] Horne v. Smith, 6 Taunt. 10, 11; Garden v. Cresswell, 2 M. & W. 319; Schales v. Hilton, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; R. v. Lord J. Russell, 7 Dowl. 693.

[4] R. v. Stretch, 4 Dowl. 30; 3 A. & E. 503, S. C.

[5] Ante, §§ 1123, 1124.

[6] Garden v. Cresswell, 2 M. & W. 319; 5 Dowl. 461, S. C.; Jacob v. Hungate, 3 Dowl. 456; R. v. Sloman, 1 Dowl. 618; Smith v. Truscott, 1 Dowl. & L. 530; 6 M. & Gr. 267, S. C.; Marshall v. The York, Newcastle & Berwick Rail. Co., 11 Com. B. 398.

[7] Ante, § 1126; Connor v. ——, Ir. Cir. R. 610, per Pennefather, B.

[8] Goff v. Mills, 2 Dowl. & L. 23, per Wightman, J.

[9] 2 Ph. Ev. 377; Garden v. Cresswell, 2 M. & W. 319; 5 Dowl. 461, S. C.

[10] Scholes v. Hilton, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; Netherwood v. Wilkinson, 17 Com. B. 226.

[11] Chapman v. Davis, 3 M. & Gr. 609, 611, 612; 4 Scott, N. R. 319; 1 Dowl. N. S. 239, S. C.; Scholes v. Hilton, 10 M. & W. 16; 2 Dowl. N. S. 230, S. C. These cases appear to overrule Tinley v. Porter, 5 Dowl. 744, and Taylor v. Williams, 4 M. & P. 59.

important, as tending to negative the existence of wilful misconduct. Thus, the Court refused to grant an attachment against Lord Brougham, when it was evident, from the notes of the judge who tried the cause, that his presence at the trial would not have served the complainant;[1] and they properly observed, that they would not allow the process of the Court to be used for purposes of needless vexation. So, in the case of Lord John Russell and Mr. Fox Maule, who had disobeyed writs of subpœna duces tecum, the Court, in discharging the rule for an attachment, relied on the fact that the documents, if produced, would not have been admissible.[2] In R. *v.* Sloman, the rule for an attachment was refused, the witness having had reasonable ground for believing that he would not be wanted at the trial.[3] On the other hand, it must be remembered that the duty of attending a court of justice in pursuance of a subpœna is paramount to the duty of obedience to the commands of any master, however stringent and express those commands may be;[4] and on this ground, an attachment has issued against an attorney, who, being served with a subpœna to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence. The Court held that he had no right to speculate on the chance of being in time.[5] Of course, if the witness be too ill to attend,[6] or if leave of absence has been given him by the attorney of the party requiring his attendance,[7] no attachment will lie; and, on ordinary principles of justice, it would seem that if in a criminal case, where no fees were tendered, a witness from real poverty should be unable to obey the summons, he would not be guilty of contempt.[8]

§ 1144. Although the Court of Queen's Bench will grant an attachment against a witness for disobeying a Crown Office

[1] Dicas *v.* Lawson, 1 C. M. & R. 934.
[2] 7 Dowl. 693. [3] 1 Dowl. 618.
[4] Goff *v.* Mills, 2 Dowl. & L. 23, 28, per Wightman, J.
[5] Jackson *v.* Seager, 2 Dowl. & L. 13, per Wightman, J.
[6] In re Jacobs, 1 Har. & W. 123. See Scholes *v.* Hilton, 10 M. & W. 15.
[7] Farrah *v.* Keat, 6 Dowl. 470. [8] 2 Ph. Ev. 383.

subpœna to give evidence in an inferior court,[1] provided that distinct proof be given by affidavit that the inferior court had jurisdiction to examine the witness,[2] it has no power, either at common law, or by virtue of the Act of 45 Geo. 3, c. 92,[3] to interfere, unless the writ has issued from the Crown Office;[4] and, consequently, in all those cases where the process is granted by the clerk of assize, or clerk of the peace, and the witness disobeys the summons, the inferior court is driven to proceed against him, either by the doubtful and arbitrary course of fining him in his absence for the contempt,[5] or by the tedious, and therefore useless, process of indictment. It may be said, that those who wish to have the attendance of witnesses enforced by the authority of the Court of Queen's Bench may always effect this purpose by obtaining a subpœna from the Crown Office; but in remote counties this course is highly inconvenient, as it occasions a considerable loss of time, and, if a town agent be employed, a needless additional expense. A much more simple and effectual method might be adopted, if the Legislature would enact, that every inferior court should, like the Crown Office, have the power of issuing subpœnas for witnesses, in whatever part of the country they might reside, and that the Court of Queen's Bench should enforce obedience to such subpœnas by the ordinary process of attachment.[6] The wholesome dread of this proceeding would, on the one hand, render it seldom necessary to have recourse to it; and the necessity for paying the expenses of the witnesses would on the other, render parties unwilling to summon persons whose presence was not materially requisite. It is only reasonable and just, that every Court, having power definitively to hear and determine any suit, should be enabled, without being driven to a circuitous mode of proceeding, to call for all adequate proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses.

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[1] R. v. Ring, 8 T. R. 585; R. v. Greenaway, 7 Q. B. 126.

[2] R. v. Vickery, 12 Q. B. 478. [3] As to which Act, see ante, § 1137.

[4] R. v. Brownell, 1 A. & E. 598.

[5] See R. v. Clement, 4 B. & A. 218. In that case the fine was imposed by one of the superior judges. Qu. whether the justices at sessions could safely exercise the like power.

[6] Ante, § 1140.

§ 1145. Though a flagrant case of palpable contempt be shown, such as an express and positive refusal to attend, the Court will not grant an attachment in the first instance; but the uniform practice which now prevails is to apply for a rule to show cause.[1] It is hardly necessary to add, that if a witness duly served, and having his expenses paid, refuses in court to be sworn or to testify, he is guilty of contempt, and may, as in all cases of contempt, be punished by fine and imprisonment, at the discretion of the Court.[2]

§ 1146. Besides the mode of proceeding by attachment, the party injured in a civil suit by the non-attendance of a witness has his remedy either by *action of debt* under the statute 5 Eliz. c. 9,[3] or by *action on the case* for damages at common law. Recourse is seldom had to the action of debt, because, although the party aggrieved may recover in this form of action the penalty of 10*l.*, in addition to what the Court might assess as a satisfaction in damages, yet this assessment must be made, not by the jury or judge at Nisi Prius, but by the Court out of which the process issued; and, this being an inconvenient course, it is more advisable to rely on the remedy by attachment, where if the witness redeems his offence by making satisfaction to the party, the Court will generally remit the punishment.[4]

§ 1147. The *action on the case* for damages is more frequent, and to support this action it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpœna;[5] neither is it requisite that the declaration should contain a direct and positive averment that the party had a good cause of action or a good defence, but it will suffice to state and prove, that the witness was material, that the trial could not safely proceed without him, and that, in point of fact, the party has sustained some damage by the

[1] Reg. Gen. H. T. 1853, r. 168. "Rules for attachment shall be absolute in the first instance in the two following cases *only*; viz. 1, for non-payment of costs on a Master's allocatur; 2, against a sheriff for not obeying a rule to return a writ or to bring in the body." 1 E. & B. app. xxviii.

[2] 4 Bl. Com. 284—288.

[3] As to which Act, see ante, § 1126.

[4] Pearson *v.* Isles, 2 Doug. 556, 560, 561, per Lord Mansfield.

[5] Lamont *v.* Crook, 6 M. & W. 615. See ante, § 1141.

absence of the witness.[1] It is true, that if *only one issue* has been joined in a suit, the plaintiff cannot practically proceed against a witness for having disobeyed his subpœna, unless he has had a good cause of action as against the original defendant; because, in order to recover damages from the witness, he must show that he has sustained some loss through his default, and this he can scarcely do without having had himself a good cause for commencing the former action.[2] This reasoning, however, does not apply, where *several issues* have been joined in the original suit; for, in such a case, it may well happen that the plaintiff, though he had no cause of action, may have sustained damage in respect of the *costs* of some of the issues, on which, although failing generally in his suit, he might have succeeded by the testimony of the witness, had he duly attended the trial.[3] In this last class of cases, therefore, the traverse of an averment of a good cause of action would simply raise an immaterial issue.[4] It seems that the same strictness of proof with respect to the form and service of the writ, which is necessary to render the witness guilty of contempt, will not be requisite in order to sustain the action;[5] and it has been held, that, although for the purpose of bringing the witness into contempt the original writ must be shown at the time when the copy is served, this course is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded by the witness.[6]

§ 1148. When the *witness is in custody*, the writ of subpœna is of no avail, and the party requiring his evidence must either apply for a *habeas corpus ad testificandum*, or obtain a warrant or order under the hand of one of the superior common law judges.[7] The granting of the writ of habeas corpus is in several cases regulated by statute. Thus, the Act of 43 Geo. 3, c. 140, provides, that any judge of the Courts at Westminster may, at his discretion,

[1] Mullett *v.* Hunt, 1 Cr. & M. 752; Davis *v.* Lovell, 4 M. & W. 678; Couling *v.* Coxe, 6 Com. B. 703; 6 Dowl. & L. 399, S. C. See Needham *v.* Fraser, 1 Com. B. 815, cited ante, § 278.

[2] Couling *v.* Coxe, 6 Com. B. 718, 719, per Wilde, C. J.

[3] Id. 703, 719, 720.

[4] Id.

[5] Davis *v.* Lovell, 4 M. & W. 684, 686, per Parke, B.

[6] Mullett *v.* Hunt, 1 Cr. & M. 758, per Bayley, B.

[7] See § 1152, post.

award a writ of habeas corpus for bringing any prisoner, detained in a gaol or prison in England, before any court-martial, any commissioners of bankrupt, commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant, for trial, or to be examined touching any matter depending before such court-martial or commissioners; and the statute 44 Geo. 3, c. 102, enacts, that a judge of any of the Superior Courts in England or Ireland may, at his discretion, grant a habeas corpus to bring up *any prisoner*, detained in a gaol or prison, before *any Court of Record*, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal, depending, or to be inquired into or determined, in any such court. Again, the Acts of 1 Will. 4, c. 22, and 3 & 4 Vict. c. 105, which respectively relate to England and Ireland, and were passed to enable witnesses to be examined by commissioners in certain cases, before the trial of the cause in which their testimony would be required, enact,—the first, in § 6, the second in § 71,—that "it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of that Act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any Court or judge under such circumstances, and in such manner, as such Court or judge may now by law issue the writ commonly called a writ of habeas corpus ad testificandum."

§ 1149. The application for a writ under either of the two first-mentioned statutes, if not under the last two, must be made to a judge at chambers,[1] on an affidavit, stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial;[2] and if the prisoner be confined at a great distance from the place of trial, the judge will perhaps require that the affidavit should point out in what manner his testimony is material.[3] If

[1] Gordon's case, 2 M. & Sel. 582; Browne *v.* Gisborne, 2 Dowl. N. S. 963, per Coleridge, J.

[2] See the form, Chit. Forms, 60; Corner's Cr. Pr., App. 66.

[3] Standard *v.* Baker, cited 2 Tidd's Pr. 858.

the witness is to give evidence in a civil suit, it is usual to add in the affidavit that he is willing to attend; but this would seem to be a needless averment, and it is certainly not required in criminal proceedings.[1] When a party to the record is in custody, he is entitled to the writ for himself as much as for any other witness, provided that his evidence be necessary at the trial.[2]

§ 1150. Before the passing of the statute 44 Geo. 3, c. 102, it was held that neither a *prisoner* in custody for *high treason*,[3] nor a *prisoner of war*,[4] could be brought up by a habeas corpus ad testificandum; and Lord Mansfield stated, with respect to the prisoner of war, that application should be made to the Secretary of State. The Court, however, on the Secretary of State refusing to interfere, granted a rule to show cause why the adverse party should not consent, either to admit the facts, or that the prisoner should be examined on interrogatories; adding, that if this consent should be refused, they would put off the trial from time to time, in order to give the applicant an opportunity of filing a bill in equity. It may now be fairly questioned whether the words of the Act, "*any* prisoner detained in *any* prison," would not be sufficiently large to warrant the interference of the judge in both these cases; and though considerations of state policy might, perhaps, lead the judges to narrow the interpretation of the statute in the case of prisoners of war, no valid reason can be urged why prisoners charged with high treason should not be placed on the same footing as other prisoners.

§ 1151. Independent of the powers expressly granted to the judges by the Acts above mentioned, the Courts at Westminster would seem, at *common law*,[5] to possess the right of awarding writs of habeas corpus ad testificandum in certain cases, though the extent of their authority is not distinctly defined. The Legislature has indirectly recognised their power to bring persons detained in *custody* under civil or criminal process before *magis-*

[1] Corner's Cr. Pr. 118. [2] Ex parte Cobbett, 4 Jur., N. S. 145, Ex.
[3] Langston *v.* Cotton, Pea. Ad. R. 21.
[4] Furly *v.* Newnham, 2 Doug. 419.
[5] See R. *v.* Freind, 13 How. St. Tr. 2, 3; R. *v.* Burbage, 3 Burr. 1440.

trates or Courts of Record;[1] and the judges themselves have claimed the right of granting these writs in other analogous cases.[2] Thus, a writ has been awarded to bring up the body of a person confined as a lunatic, for the purpose of giving evidence in a cause, on an affidavit that he was not dangerous, and was in a fit state to be examined.[3] So, a prisoner in civil custody has been brought up by habeas corpus, for the purpose of being examined as a witness before an arbitrator.[4] So, a habeas corpus has issued from the Court of Queen's Bench to bring up a prisoner committed by that Court for non-payment of a fine, to give evidence before an election committee, on an affidavit that the rule to show cause had been served on the under-sheriff, the solicitor of the Treasury, the prisoner himself, and the party at whose suit he was in execution, and no cause being shown.[5] On a similar application being subsequently made to the Court, the only difference being that the prisoner was in custody on a charge of felony, the judges doubted their power, but granted a rule nisi, directing notice to be given to the Attorney-General, the committing magistrate, the person having the custody of the prisoner, and all parties at whose suit he might be detained on civil process.[6] It became unnecessary to call upon the Court to make this rule absolute. Again, if the witness is in the military or naval service, and therefore not at liberty to attend without the leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of habeas corpus; but in such case, the Court of Queen's Bench will refuse to award the writ, unless the affidavit states that the witness has been served with a subpœna, and is willing to attend; for a free man cannot

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[1] See preamble of 43 Geo. 3, c. 140, and Ex parte Griffiths, 5 B. & A. 730.

[2] See in re Cook, 7 Q. B. 653, where the Court refused to issue a writ of habeas corpus to bring up a prisoner who had been committed on a charge of murdering A., before a coroner's jury, who were sitting on A.'s body, for the purpose of his being *identified* by the witnesses. In this case, the judges seemed to be of opinion, that they had power to issue such writ in a case of necessity. See also Daniel *v.* Thompson, 15 East, 78; Att.-Gen. *v.* Fadden, 1 Price, 403. [3] Fennell *v.* Tait, 1 C. M. & R. 584.

[4] Graham *v.* Glover, 25 L. J., Q. B., 10; 5 E. & B. 591, S. C.; Marsden *v.* Overbury, 18 Com. B. 34. [5] In re Price, 4 East, 587.

[6] In re Pilgrim, 3 A. & E. 485; 4 Dowl. 89, S. C. nom. R. *v.* Pilgrim.

be brought up as a prisoner against his consent.[1] In all these cases the writ will be directed to the gaoler, sheriff, commanding officer, or other person, in whose custody, or under whose control, the witness is detained, who, on being served with it, and being paid or tendered his reasonable charges, will be bound to produce the witness according to the exigency of the writ.

§ 1152. As Lord Denman's Act,[2] by rendering convicted prisoners competent witnesses, caused applications for writs of habeas corpus to be more frequent than they formerly were, the Legislature, in 1853, thought it convenient to provide, in certain cases, a summary mode of obtaining the attendance of witnesses in *criminal* custody. It has, therefore, been enacted, by § 9 of 16 & 17 Vict., c. 30, that any secretary of state and any judge of the Superior Courts of Common Law at Westminster, may, if he think fit, "upon application by affidavit, issue a warrant, or order, under his hand, for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise, (*except* under process in any *civil* action, suit, or proceeding,) before any Court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such Court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such Court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner required by any writ of habeas corpus awarded by any of her Majesty's Superior Courts of Law at Westminster, to be brought before such Court to be examined as a witness in any cause or matter depending before such Court, is now by law required to be dealt with."

§ 1153. Somewhat similar provisions have long been in force in Ireland under § 2 of the statute 38 Geo. 3, c. 26, which enacts, that "it shall be lawful for the justices of Assize, or Nisi Prius, or the commissioners of oyer and terminer and gaol delivery, by

[1] R. v. Roddam, 2 Cowp. 672. [2] 6 & 7 Vict., c. 85, § 1.

order in writing to be by them respectively signed, to direct any person in execution, and in the custody of any sheriff or other officer, in any county wherein they shall sit, to be brought up for the purpose of giving evidence in any cause or trial to be had before them respectively."

§ 1154. Besides these modes of enforcing the attendance of witnesses, which apply generally to proceedings before courts of ordinary common-law jurisdiction, more or less compulsory powers for the same purpose are intrusted to many courts or persons having a limited or special jurisdiction. The limits of this work will not admit of a full analysis, or even a complete enumeration of these powers, but a brief sketch will be given of such as appear to be of general importance.

§ 1155. In *Courts of Equity*, witnesses,—whether required to give evidence orally in court,[1] or to testify before one of the examiners of the court,[2] or before an examiner specially

[1] 15 & 16 Vict., c. 86, § 39, enacts, that "upon the hearing of any cause depending in the said court [of Chancery], whether commenced by bill or by claim, the Court, if it shall see fit so to do, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit or in such manner as it may think fit."

[2] 15 & 16 Vict., c. 86, § 40, enacts, that "any party in any cause or matter depending in the said court may, by a writ of subpœna ad testificandum or duces tecum, require the attendance of any witness before an examiner of the said court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the Court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used or which shall be used on any claim, motion, petition, or other proceeding before the Court, shall be bound, on being served with such writ, to attend before an examiner, for the purpose of being cross-examined: Provided always, that the Court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders or otherwise, as may appear necessary to meet the justice of the case." Where a defendant, upon the plaintiff's application, has made an affidavit as to documents in his possession under § 18 of this Act, he is not liable under § 40, to be cross-examined, unless he gives

appointed,[1]—are summoned by writs of subpœna,[2] which the record and writ clerk is bound to issue at the instance of the party applying for them, without any order of the Court for that purpose having first been obtained.[3] These writs are usually, if not necessarily, accompanied by a *notice in writing* of the time and place of examination. The witness, as at common law, must be paid or tendered his expenses;[4] and then if he refuse to attend, or attending refuse to be sworn, or to answer legal questions, the examiner may certify his misconduct to the Court; and the Court, on motion, supported by this certificate, and by an affidavit of service of the subpœna and the notice, will order him peremptorily to do the act required; and, on his still refusing, will, on a second application being made for that purpose, commit him for contempt, or will sometimes compel him to appear and be examined in court at his own costs.[5] The examiners, whether ordinary or special, are respectively authorised to administer oaths; the former, under the Act of 3 & 4 Will. 4, c. 94, § 27; the latter, by virtue of § 35

notice that he intends to use the affidavit as evidence for himself. Manby *v.* Bewicke, 26 L. J., Ch., 20; overruling Kay *v.* Smith, 20 Beav. 564; 24 L. J., Ch., 788, S. C. See Clarke *v.* Law, 2 Kay & J. 28.

[1] As the costs of employing a special examiner are extremely heavy, the Court, it seems, will not appoint one, except in a case of absolute necessity, Brocas *v.* Lloyd, 21 Beav. 519. But see Reed *v.* Prest, Kay, App. xiv.

[2] The mode of issuing subpœnas in equity is regulated partly by the Act of 3 & 4 Will. 4, c. 94, § 31, and partly by the Orders in Chancery, E. T. 1845, made in pursuance of the Acts 3 & 4 Vict., c. 94, and 4 & 5 Vict., c. 52. The Orders bearing on this subject are as follows:—

XXIV. All writs of subpœna in this court are to be prepared by the solicitor of the party requiring the same; and the seal for sealing the same is to be marked or inscribed with the words "Subpœna Office, Chancery;" and such writs are to be in the terms mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

XXV. In the interval between the suing out and service of any subpœna, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed, upon payment to the clerk of the subpœna office of a fee of 1s., and at the same time leaving a corrected præcipe of such subpœna, marked, altered, and resealed, and signed with the name and address of the solicitor or solicitors suing out the same.

[3] Holden *v.* Holden, and Hill *v.* Dolt, 7 De Gex, M. & Gord. 397.

[4] Ante, §§ 1126—1128.

[5] Gresley, Ev. 59, 74—76.

of 15 & 16 Vict., c. 86; but none of these officers are empowered either to compel the attendance, or to punish the misconduct, of witnesses, except by resorting to the cumbrous and costly process stated above.[1] Some persons, well acquainted with the practical working of the present system, have strenuously urged the propriety of strengthening the hands of these functionaries, and of enabling them, without first applying to the Court, to punish the improper conduct of witnesses;[2] but, as yet, this measure, though well deserving of serious consideration, has not been sanctioned by the Legislature.

§ 1156. When a Chief Clerk is directed by a judge in equity to examine any party or witness, he is authorised to enforce the attendance of such party or witness by summons; and if this summons be not obeyed, the party or witness will be liable to process of contempt in like manner as he would be were he to disobey any order of the Court, or any writ of subpœna.[3] A

[1] 15 & 16 Vict., c. 86, § 33, enacts, that "if any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court upon written interrogatories, and refusing to be sworn, or to answer some lawful question: Provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the Court; and the costs of and occasioned by such demurrer or objection shall be in the direction of the Court."

[2] See Gresley, Ev. 59.

[3] 15 & 16 Vict., c. 80, § 30, enacts, that "each Chief Clerk shall, for the purpose of any proceedings directed by the Master of the Rolls or any Vice-Chancellor to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments, other than acknowledgments by married women, to receive affirmations, and, when so directed by the judge to whose court he is attached, to examine parties and witnesses, either upon interrogatories or vivâ voce as such judge shall direct."

§ 31 enacts, that "parties and witnesses so summoned shall be bound to attend in pursuance of any such summons, and shall be liable to process of

witness, also, who refuses to be sworn, when summoned before a chief clerk, does so at the risk of being committed by the Court;[1] and if he answers in an unsatisfactory manner, an application should be made to have him examined by the judge.[2] He may, too, as it seems, himself apply to the chief clerk, on special grounds, either to have the assistance of counsel, or to have the inquiry adjourned into court.[3]

§ 1157. Under the "Joint-Stock Companies Winding-up Act, 1848,"[4] the Master in Chancery, who is empowered to wind up the affairs of any company, may summon before him any person, whether a contributory of the company or not, who shall be deemed capable of giving information concerning the company, and its estate, dealings, or affairs, and may order him to produce, and if a contributory to leave with the master or the official

contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said Court, or in case of default in attendance, in pursuance of any order of the said Court, or of any writ of subpœna ad testificandum."

The "Form of Summons by Chief Clerk," as given in Sch. B. to the Orders of the 16th of October, 1852, is as follows :—

"In Chancery.

In the Matter of the Estate of John Thomas, late of in the county of , deceased,

or

Joseph Wilson *v.* William Jackson.

The defendant, William Jackson [*or*, A. B. of, &c.] is hereby summoned to attend at the chambers of the Master of the Rolls [*or*, Vice-Chancellor], in the Rolls Yard, Chancery Lane [*or*, No. —, —— Square, Lincoln's Inn, Middlesex], on the day of at of the clock in the noon, to be examined [*or*, to be examined as a witness on the part of the] for the purpose of the proceedings directed by the Master of the Rolls [*or*, the said Vice-Chancellor] to be taken before me.

Dated this day of 185 .

A. B., Chief Clerk.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for ."

[1] In re The Electric Telegraph Co. of Ireland, ex parte Bunn, 26 L. J., Ch., 614, per Romilly, M. R. [2] Hayward *v.* Hayward, Kay, App. xxxi.

[3] In re The Electric Telegraph Co. of Ireland, ex parte Bunn, 26 L. J., Ch., 614.

[4] 11 & 12 Vict., c. 45, § 63. See also 12 & 13 Vict., c. 108, §§ 19—23.

manager, any books, papers, or other documents in his custody, possession, or power, which the master may deem expedient to be produced or left; and if such person shall not attend, or shall not produce his papers, he may be committed to the Queen's prison. But here, also, the master has no direct power of commitment; for, although such power, as will presently be shown,[1] is intrusted to every justice of the peace, the Legislature, actuated by a strange jealousy, the motives for which cannot be understood, has expressly provided that "every such default or refusal shall be certified by the master, and thereupon such order shall be made by the Court, upon motion for that purpose, of which notice shall be given to the person sought to be affected, as the Court shall see fit."[2] The inconvenience of this course of proceeding, and the delay and expense consequent upon it, cannot fail to strike any one who reflects upon the subject.

§ 1158. Witnesses required to give evidence on oath, either before the *House of Lords*, or before any of the *Lords' committees* on Private Bills,[3] are served with an order of the House, signed by the assistant clerk of the Parliaments, which directs them to attend at the bar on a certain day to be either sworn and examined, or sworn alone.[4] The *Select Committees* of the Lords now examine witnesses unsworn, unless otherwise ordered by the House,[5] and such persons are ordered to attend, not at the bar, but before the particular Committee. The service of the order must, generally, be personal, but if the witness be purposely keeping out of the way, it is usual to direct that a service at his house shall be deemed sufficient.[6] If he disobey this summons, the House will order him to be taken into custody, either forthwith,[7] or after the expiration of a certain time;[8] and if the black rod cannot succeed in taking him, the House will address the Crown to issue a proclamation, offering a reward for his apprehension.[9] When the evidence of peers, peeresses, or Lords of Parliament is required, the Lord Chancellor is ordered to write letters to them, desiring

[1] Post, § 1184. [2] 11 & 12 Vict., c. 45, § 63.

[3] Min. of H. of L., 4 June, 1857. Such Committees examine witnesses on oath, unless otherwise ordered by the House; Id.

[4] 66 Lords' J. 400. [5] Min. of H. of L., 4 June, 1857.

[6] 66 Lords' J. 295. [7] Id. 400. [8] Id. 358. [9] Id. 441.

their attendance to be examined as witnesses;[1] and such persons are sworn by the Lord Chancellor at the table,[2] while all other witnesses, if required to be examined on oath, are sworn at the bar by the officer of the House.[3] If the witness be a member, or an officer, of the House of Commons, a message is sent to that House requesting his attendance;[4] upon which the lower House returns answer, by its messenger, that it gives him leave to attend, adding, in case he be a member, "if he think fit."[5] If the witness, on attending, refuse to be sworn, or prevaricate, or otherwise misbehave, he will be punished by the House as for contempt; and if he give false evidence after being sworn, he may be indicted for perjury.[6]

§ 1159. In the *House of Commons* the course is very similar, witnesses being summoned to attend by an order of the House signed by the clerk, which is either personally served upon him, or, if he live at a distance, is forwarded to him by post, or sometimes by a special messenger. If, after service, the witness neglect to attend, or if he abscond, the Speaker, by order of the House, will issue his warrant, directing the serjeant-at-arms to apprehend the witness, and to bring him to the bar; whereupon he will generally be committed to Newgate; as will also all persons who aid him in his endeavours to keep out of the way.[7] If the attendance of a Lord of Parliament, or of an officer of the upper House be desired, the Commons adopt the same form of proceeding as that observed by the Lords, when they require the attendance of a member of the lower House;[8] but whether this form be necessary, if the witness be simply a peer or peeress, is a matter upon which the two branches of the Legislature appear to be at issue.[9] If the testimony of a member be desired by the House, or by a committee of the whole House, he is ordered to attend in his place; but if he be required to give evidence before a select committee, such committee should request his attendance,

[1] 75 Lords' J. 144. [2] Id. 201. [3] May, Law of Parl. 243.
[4] 75 Lords' J. 157. [5] Id. 164. [6] May, Law of Parl. 243.
[7] Id. 239; Gosset v. Howard, 10 Q. B. 359, 411, 451.
[8] May, Law of Parl. 241, 242; 83 Com. J. 278; 91 id. 75; 82 id. 465.
[9] May, Law of Parl. 242, 243; 4 Lords' J. 812.

and if he refuse to appear, should acquaint the House therewith, who will then order him to attend, and, if necessary, will even commit him to the custody of the serjeant-at-arms, that he may be forthcoming at the proper time.[1] If a person in custody is required to give evidence, the Speaker usually issues his warrant, which is personally served on the gaoler by a messenger of the House, and by which he is directed to bring the witness in his custody to be examined.[2] Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions, writs of habeas corpus ad testificandum have, in order to protect the gaoler, been applied for in the Court of Queen's Bench.[3]

§ 1160. If the witness is to be examined before a *select committee*, the chairman, by direction of the committee, in general signs an order for his attendance; and if this order be disobeyed, his conduct is reported to the House, which immediately issues the usual order, to be enforced as in other cases. The attendance of a witness before a committee on a private bill can only be enforced by an order of the House.[4]

§ 1161. The mode of proceeding where witnesses are required to attend before *election committees*, is regulated by the Act of 11 & 12 Vict., c. 98, which in § 83,[5] enacts, that the select committee to whom the election petition is referred, "may send for persons, papers, and records, and may examine any person who has subscribed the petition, which such select committee are appointed to try, *unless it otherwise appear to such committee that such person is an interested witness*, and they shall examine all the witnesses who come before them *upon oath*, which oath the clerk attending such select committee may administer; and if any person summoned by such select committee, or by the warrant of

[1] May, Law of Parl. 240, 241.

[2] May, Law of Parl. 239 ; 90 Com. J. 533. The order of the House of Lords has been used for the same purpose, May, Law of Parl. 238.

[3] See ante, § 1151; in re Price, 4 East, 587 ; in re Pilgrim, 3 A. & E. 485.

[4] May, Law of Parl. 240 ; 98 Com. J. 153, 174, 279, 288.

[5] As to the mode of summoning witnesses before commissioners appointed to take evidence in Irish election petitions, see 42 Geo. 3, c. 106, §§ 23, 28, 29, 30, mentioned post, § 1195.

the Speaker of the House of Commons (which warrant the Speaker may issue from time to time as he thinks fit), disobey such summons, or if any witness before such select committee give false evidence, or prevaricate, or otherwise misbehave in giving or refusing to give evidence, the chairman of such select committee, by their direction, may, at any time during the course of their proceedings, report the same to the House for the interposition of the authority or censure of the House, as the case requires, and may, by a warrant under his hand directed to the serjeant-at-arms attending the House of Commons, or to his deputy or deputies, commit such person (not being a Peer of the realm or Lord of Parliament) to the custody of the said serjeant, without bail or mainprize, for any time not exceeding twenty-four hours, if the House be then sitting, and if not, then for a time not exceeding twenty-four hours after the hour to which the House stands adjourned."[1] This section is remarkable, because, by impliedly providing that interested witnesses, who have subscribed the petition, shall not be examined, it lays down a rule different from that which, since Lord Denman's Act,[2] has prevailed in courts of justice; but the distinction between the two statutes has recently become of no real importance, since it is quite clear that, under Lord Brougham's Act of 1851, the petitioners, however deeply and directly they may be interested in the election, are now, in common with the sitting member, competent and compellable to give evidence on either side.[3]

§ 1162. The Act for regulating election committees further deserves notice as furnishing the only instance of the House of Commons, or of any committee of that House, being *specifically* authorised by the Legislature to cause an oath to be administered.[4]

[1] §§ 94—97 provide, among other things, the mode by which the expenses of witnesses shall be taxed and paid.

[2] 6 & 7 Vict., c. 85.

[3] 14 & 15 Vict., c. 99, § 2, cited post, § 1217.

[4] 11 & 12 Vict., c. 98, § 84, enacts, that "where in this Act anything is required to be verified on oath to the House of Commons, it shall be lawful for the clerk of the House of Commons to administer an oath for that purpose, or an affidavit for such purpose may be sworn before any justice of the peace or Master of the High Court of Chancery." § 85 enacts, that any person giving false evidence under the Act, shall be liable to the penalties of perjury.

It is true that by virtue of the Act of 1851 to Amend the Law of Evidence[1] the House of Commons and its respective committees would seem to be empowered, in common with every other "Court," to administer an oath to all such witnesses as are legally called before them; but it may well be doubted whether this result was contemplated by all the members who supported that valuable measure. That the House of Commons prior to the year 1851 should not, excepting with reference to election petitions, have enjoyed the power of administering oaths to witnesses, intrusted as that power is to every justice of the peace and insignificant commissioner, is certainly a curious historical fact; but the anomaly was productive of but little practical evil; for, although the giving false testimony before the House of Commons did not render the witness liable to the penalties of perjury, it subjected him to punishment as guilty of a breach of privilege; and many cases may be found in the Journals, where parties, who have stated falsehoods, or prevaricated, or suppressed the truth, or refused either to answer questions, or to produce documents in their possession, have been given into the custody of the serjeant-at-arms, or even committed to gaol.[2]

§ 1103. The Act of 3 & 4 Will. 4, c. 41, determines the mode by which witnesses are forced to attend before the *Judicial Committee of the Privy Council*, and enacts, in § 19, that the President of the Council may require the attendance of any witnesses, and the production of any deeds, evidences, or writings, by writ to be issued by him in the same form, as nearly as may be, as that in

[1] 14 & 15 Vict., c. 99, § 16, cited post, § 1254.

[2] At the commencement of each session, the two following resolutions are passed by the House:—

1st. "That if it shall appear that any person hath been tampering with any witness, in respect to his evidence to be given to this House, or any committee thereof, or directly or indirectly hath endeavoured to deter or hinder any person from appearing or giving evidence, the same is declared to be a high crime and misdemeanor; and this House will proceed with the utmost severity against such offender."

2nd. "That if it shall appear that any person hath given false evidence in any case before this House, or any committee thereof, this House will proceed with the utmost severity against such offender." See May, Law of Parl. 245.

which a writ of subpœna ad testificandum, or of subpœna duces tecum is now issued by the Court of Queen's Bench; and that every person disobeying such writ, so to be issued by the president, shall be considered as in contempt of the Judicial Committee, and shall also be liable to the same penalties and consequences as if such writ had issued out of the Court of Queen's Bench; and may be sued for such penalties in that court.

§ 1163 A. In the Courts of Probate, which have recently been established in England and Ireland, the attendance of witnesses and the production of documents are enforced by writs, which the Courts are respectively authorised to issue, and which resemble as nearly as possible the ordinary writs of subpœna ad testificandum, and subpœna duces tecum, now issued by any of the Superior Courts of law; and every person disobeying any such writ shall be considered as in contempt of the Court, and also be liable to forfeit a sum not exceeding 100*l.*[1] The Courts of Probate are further empowered to punish all persons guilty of such contempt, in the same manner as the Court of Chancery might do in any suit or matter depending therein.[2]

§ 1163 B. The new Court for Divorce and Matrimonial Causes "may, under its seal, issue writs of subpœna or subpœna duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in *any part of Great Britain or Ireland;* and every person served with such writ shall be bound to attend, and to be sworn and give evidence in obedience thereto, in the same manner as if it had been a writ of subpœna or subpœna duces tecum issued from any of the *said* Superior Courts of Common Law [at Westminster] and served in Great Britain or Ireland."[3]

[1] 20 & 21 Vict., c. 77, § 24; 20 & 21 Vict., c. 79, § 29, Ir. The subpœna is written or printed on parchment, and may include the names of any number of witnesses. See Rules for Ct. of Prob. in contentious business, r. 29, and Forms, Nos. 17, 18, 19, & 20.

[2] 20 & 21 Vict., c. 77, § 25; 20 & 21 Vict., c. 79, § 30, Ir.

[3] 20 & 21 Vict., c. 85, § 49.

§ 1164. The attendance of witnesses before the *Ecclesiastical Courts* is required by a *compulsory*, which is an instrument somewhat in the nature of a subpœna.[1] If the witness on the return of this process does not appear, the Court may pronounce him contumacious;[2] and on certifying the same to the Lord Chancellor within ten days, a writ de contumace capiendo will issue, unless the party be a Peer or Lord of Parliament, or a member of the House of Commons, whereupon he will be arrested and detained in custody, until he either submit to the Court, or be absolved or discharged by order of the ecclesiastical judge.[3] His expenses, however, must be tendered or paid by the party calling him, as in civil proceedings before the common-law courts.[4] The Act for better enforcing Church Discipline,[5] which authorises bishops to issue commissions of inquiry into the grounds of any charge or report against clerks in holy orders, and which empowers bishops to take ulterior proceedings against such clerks, reserving to the latter the right of appeal to the provincial Court of Appeal, provides in § 17 that "it shall be lawful, in any such inquiry, for any three or more of the commissioners, and in any such proceeding, for the bishop, or for any assessor of the bishop, or for the judge of the Court of Appeal of the province, to require the attendance of such witnesses, and the production of such deeds, evidences, or writings, as may be necessary; and such bishop, judge, assessor, and commissioners respectively, shall have the same powers for these purposes as now belong to the Consistorial Court and to the Court of Arches respectively." So the Act of 6 & 7 Vict., c. 62, provides, in § 2, that any two or more of the commissioners appointed under that Act to inquire into the mental capacity of archbishops or bishops, may "require the attendance of such witnesses as may be necessary; and such commissioners respectively shall have the same powers for this purpose as now belong to the Consistorial Court and the Court of Arches, respectively."

[1] 3 Burn's Eccl. Law, 310.
[2] Wyllie v. Mott, 1 Hagg. Ec. R. 34.
[3] 2 & 3 Will. 4, c. 93, § 1.
[4] Ayliffe, Parerg. 536; 1 Ought. 121; 3 Burn's Eccl. Law, 309.
[5] 3 & 4 Vict., c. 86.

§ 1165. The mode of enforcing the attendance of witnesses before the *High Court of Admiralty* is regulated by the Act of 3 & 4 Vict., c. 65, which, by § 9, provides, that the judge of that court, or any commissioner appointed in pursuance of that Act, may require the attendance of any witnesses, and the production of any deeds, evidences, books, or writings, by writ to be issued by such judge or commissioner, in such and the same form, or as nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by the Court of Queen's Bench;[1] and that every person disobeying any such writ so to be issued by the said judge or commissioner, shall be considered as in contempt of the said High Court of Admiralty, and may be punished for such contempt in the said court.

§ 1166. The annual Mutiny Acts provide, that all witnesses, as well civil as military, who are required to attend *Courts-martial*, whether military or marine, shall, in the case of general courts-martial, be duly summoned by the Judge Advocate-General, or his deputy, or the person officiating as such; and in the case of all other courts-martial, by the President of the court; and in either case, if the witness so summoned shall not attend, or attending shall refuse to be sworn, or shall not produce documents under his control required to be produced, or being sworn shall refuse to give evidence, or to answer all such questions as the Court may legally demand of him, he shall be liable to be attached in the Court of Queen's Bench in London or Dublin, or Court of Session or other court of law in Scotland or elsewhere, in the like manner as if he had disobeyed a subpœna or other similar process in such last-mentioned courts.[2]

§ 1167. The Act of 6 & 7 Will. 4, c. 106, provides for the attendance of witnesses before the court of the *Vice-Warden of the Stannaries*, and enacts, in § 9, that the service of every writ of subpœna to attend and give evidence hereafter to be issued out of either side of the court of the Vice-Warden, and served upon any person in any part of England or Wales, shall be as valid

[1] See In re the Glory, 7 Ec. & Mar. Cas. 262.
[2] See 17 & 18 Vict., c. 4, § 15; 17 & 18 Vict., c. 6, § 17.

and effectual in law, and shall entitle the party suing out the same to all and the like remedies by action or otherwise, as if the same had been served within the jurisdiction of the court of the Vice-Warden; and that, in case the person so served shall not appear according to the exigency of the writ, the court of the Vice-Warden, upon oath or affirmation to be taken in open court, or affidavit of the personal service of such writ, may transmit a certificate of such default, under the seal of the court, to the Court of Queen's Bench at Westminster; and the last-mentioned court shall proceed against, and punish by attachment or otherwise, according to the course and practice of that court, the person so having made default, in such and the like manner as the same court might have done, if such person had neglected or refused to appear in obedience to a writ of subpœna issued to compel the attendance of witnesses out of such last-mentioned court. § 10 provides, that the Court of Queen's Bench shall not, in any such case as aforesaid, proceed against or punish any person, nor shall any such person be liable to any action for having made default by not appearing to give evidence in obedience to any such writ of subpœna, unless it shall appear to the Court of Queen's Bench that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, and of returning therefrom, had been tendered to him, at the time when the writ of subpœna was served upon him.

§ 1168. The Act of 13 & 14 Vict., c. 43, contains very similar provisions to those just cited, for the purpose of compelling witnesses, who live out of the jurisdiction, to attend either before the *Court of Chancery of the County Palatine of Lancaster*, or before the registrar of that court as well in his capacity of examiner as in that of master, or before any commissioners appointed by that court for the examination of witnesses.[1] Somewhat similar enactments are also contained in "the High Peak Mining Customs, and Mineral Courts Act, 1851,"[2] for the purpose of compelling witnesses to attend before the Barmote Courts in Derbyshire.

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[1] See §§ 17 & 18.

[2] 14 & 15 Vict., c. 94, §§ 31, 40.

§ 1169. The attendance of witnesses before *coroners* is provided for by statute 7 & 8 Vict., c, 92, § 17, which enacts, that "if any person, having been duly summoned as a juror, or witness to give evidence upon any coroner's inquest, as well of liberties and franchises contributing to the county rates, as of counties, cities, and boroughs, shall not, after being openly called three times, appear and serve as such juror, or appear and give evidence on such inquest," the coroner may impose on him a *fine not exceeding forty shillings;* and the Act then provides, "that nothing therein contained shall be construed to affect any power now by law vested in the coroner, for compelling any person to appear and give evidence before him on any inquest or other proceeding, or for punishing any person for contempt of court, in not so appearing and giving evidence, or otherwise." This proviso, in its present general form, might have been well spared, since the leaving undefined power in the hands of petty officers can seldom be productive of real benefit to the public, and may often furnish an odious mode of annoying and oppressing particular individuals. Still some proviso was necessary, in order to leave unaffected the Act of 6 & 7 Will. 4, c. 89, which, after authorising coroners, in the first five sections, to order *medical witnesses* to attend inquests, &c., and enabling such witnesses to claim a certain remuneration for their attendance,[1] enacts, in § 6, that, where any order for the attendance of any medical practitioner has been personally served upon him, or where, though not personally served, it has been received by him in sufficient time to be obeyed, or where it has been served at his residence;—in all these cases, the medical man shall, in case of disobedience, *forfeit the sum of five pounds*, upon complaint made by the coroner, or any two of

[1] The fee to which, in Great Britain, a legally qualified medical practitioner is entitled, for attending to give evidence at an inquest, is one guinea, and for making a post-mortem examination of the deceased, either with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, is two guineas. See § 3, and Schedule to the Act. These sums must now be paid to the medical man by the coroner immediately after the termination of the proceedings at any inquest, and the coroner will be repaid out of the county rates or borough fund; 7 Will. 4 & 1 Vict., c. 68, §§ 2, 3. See, as to the Irish regulations, 9 & 10 Vict., c. 37, §§ 22, 28, 32—35, 44, and Sched. C.

the jury, before two justices having jurisdiction in the place where the inquest was held, or in the parish where the medical practitioner resides; and the justices are required, upon such complaint, to adjudicate thereon, and if the medical man does not show good cause for not having obeyed the order, to enforce the penalty by distress and sale of his goods.

§ 1170. The mode of compelling witnesses to attend before the Court of Bankruptcy is now regulated by the Bankrupt Law Consolidation Act, 1849,[1] which, by § 100,[2] empowers the Court, before adjudication, to summon before it any person whom it shall believe capable of giving any information concerning the trading of, or any act of bankruptcy committed by, the supposed bankrupt; and to require such person to produce any books, papers, deeds, writings, and other documents in his custody, possession, or power, which it may deem necessary to establish such trading, or act of bankruptcy. After the adjudication of bankruptcy, the Court is further empowered, by § 120,[3] to summon any person known or suspected to have any of the bankrupt's estate in his possession, or who is supposed to be indebted to the bankrupt, or whom it may believe capable of giving information concerning the person, trading, dealings, or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings; and to require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the Court necessary to the verification of his deposition, or to the full disclosure of any of the matters into which the Court is authorised to inquire. If the person so summoned shall neglect to attend at the time appointed, having no lawful impediment made known to the Court at the time of its sitting, and allowed by it, the Court may, by warrant, direct him to be apprehended and brought before it for examination.

[1] 12 & 13 Vict., c. 106. The Act of 20 & 21 Vict., c. 60, Ir., contains similar provisions respecting the attendance of witnesses before "The Court of Bankruptcy and Insolvency" in Ireland.

[2] See 20 & 21 Vict., c. 60, § 126, Ir.

[3] See id. § 308.

§ 1171. Under these sections it has been held, first, that if a party be summoned to attend the Court at a certain place and hour, it is his duty not only to go to that place at the time appointed, but to wait there until he be examined, or until his attendance be dispensed with; and, secondly, that, if he disobey a summons, directing him to appear at a meeting, and to bring a certain deed with him, he may be legally apprehended on a warrant, authorising the constable to bring him before the commissioners "to be examined as aforesaid, and to produce the said deed;" for although the words employed in the Act are simply "to be examined as aforesaid," yet these words by necessary intendment mean, that the party should be compelled by warrant to do all that he was required to do by summons; and, therefore, if the summons require him to produce a document, the warrant should contain a similar requisition.[1] The commissioners, however, will not be justified in issuing their warrant, unless a reasonable time has intervened between the service of the summons, and the time when the attendance was required;[2] but it seems that they need not have information on oath of the service of the summons before they issue their warrant, though if they take this step, when in fact the summons has not been served, they render themselves liable to an action.[3]

§ 1172. It is not necessary, as in serving writs of subpœna,[4] that in all cases the *summons* should be *served personally* on the witness; but if it be shown by affidavit, to the satisfaction of the Court, that the witness to whom any summons is directed is keeping out of the way, and cannot be personally served therewith, and that due pains have been taken to effect such service, the Court may order, by indorsement upon the summons, that the delivery of a copy to the wife, or servant, or some adult inmate of the house or family of the party, at his usual or last known place of abode or business, and explaining the purport thereof to such wife, servant, or inmate, shall be equivalent to

[1] Wright *v.* Maude, 10 M. & W. 527; 2 Dowl. N. S. 517, S. C.

[2] Groocock *v.* Cooper, 8 B. & C. 211; 2 M. & R. 78, S. C. The question of reasonable time is for the jury, id. See ante, § 30.

[3] Id.

[4] Ante, § 1124.

personal service; and the service of such summons in pursuance of such order shall be of the same force and effect as if the party to whom the summons was directed had been personally served therewith.[1]

§ 1173. The Bankrupt Act further enacts, in § 122, that upon the appearance of any person *summoned* or *brought* before the Court upon warrant, or if *any person be present at any sitting* of the Court, the Court may examine him upon oath, either by word of mouth, or by interrogatories in writing, concerning the person, trade, dealings, or estate of any bankrupt, or concerning any act of bankruptcy by any bankrupt committed, and may reduce into writing his answers, and such answers so reduced into writing he is required to sign and subscribe; while § 260 provides, that if any such person shall refuse to be sworn, or shall refuse to answer any lawful question put by the Court, or shall not fully answer any such question to the satisfaction of the Court,[2] or shall refuse to sign and subscribe his examination when reduced into writing, (not having any lawful objection allowed by the Court), or shall not produce any books, papers, deeds, writings, and other documents in his custody or power relating to any of the matters under inquiry, which he is required by the Court to produce, and to the production of which he shall not state any objection allowed by the Court, the Court may by warrant[3] commit him, in London to the Queen's prison, or in the country to such prison as it shall think fit, there to remain without bail, until he shall submit himself to such Court to be sworn, and full answers make to its satisfaction, to all such lawful questions as shall be put by the Court, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents in his custody or power, to the production of which no such objection as aforesaid has been allowed. Under this last

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[1] 12 & 13 Vict., c. 106, § 121.

[2] See Ex parte Bradbury, 14 Com. B. 15.

[3] § 261 enacts, that "if any person be committed by the Court for refusing to answer, or for not fully answering any question put to him by the Court, such Court shall in its warrant of commitment specify every such question."

section, the Court has no power to commit a witness for refusing to read certain entries in a ledger; for it is impossible to say that a request to read an entry in a book is, either in form or substance, a question.[1] So, if a witness be summoned to produce a deed, and refuse to do so, he cannot be committed for not answering satisfactorily, but the warrant must state that the non-production of the deed was the ground of the commitment.[2] Still, if a witness refuse to produce his books in order to refresh his memory, and is thereby prevented from answering questions, he may be committed for not answering satisfactorily, such conduct being tantamount to a refusal to answer.[3] § 260 also empowers the Court to summon the *bankrupt's wife*, and renders her liable, in case of disobedience, to the same penalty as is incurred by other refractory witnesses.

§ 1174. It is further provided, by § 250, that every person summoned to attend before the Court as a person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall have such costs and charges as the Court in its discretion shall think fit; and every witness summoned to attend before the Court shall have his necessary expenses tendered to him, in like manner as is now by law required upon service of a subpœna to a witness in an action at law. By the joint operation of § 7 of the Act of 14 & 15 Vict. c. 83, and § 13 of the Bankrupt Act, the Lords Justices of the Court of Appeal in Chancery "have the like power of summoning and compelling attendance, and of examination, and of enforcing obedience to examination and to any order duly made, whether relating to any examination or to any other matter, and of requiring and compelling the production of books, papers, deeds, writings, and other documents, and have the like power of commitment, as is by the Bankrupt Act given to the Court of Bankruptcy."

§ 1175. The mode of summoning witnesses before the *Insol-*

[1] Isaac *v.* Impey, 10 B. & C. 442; 4 C. & P. 113, S. C.
[2] Ex parte Frowd, Mon. & M'Ar. 269.
[3] In re Dale, Mon. & M'Ar. 271, n. *a.*

vent Debtors' Court, is mainly regulated by § 27 of 1 & 2 Vict., c. 110, which enacts, among other things, that the Court or any commissioner thereof acting under the powers of that Act, may administer oaths, and examine all parties and witnesses upon oath for the purposes of that Act, and shall have the same powers of compelling the attendance of witnesses both before the Court and before any acting commissioner thereof, and before an officer of the Court or examiner as thereinafter mentioned,[1] and before such justices as are thereinafter mentioned,[2] and of requiring and compelling the production of books and writings, as are possessed by any of the superior courts at Westminster;[3] and may order any prisoner, who shall be a necessary and material witness in any matter pending in the court, to be brought before the Court or commissioner, or officer, or examiner, or justices, as often as shall be requisite; and that the Court, or any acting commissioner thereof, shall have the power of committing all persons guilty of any contempt of the Court to the Queen's prison,[4] or to the common gaol of any county in which such person shall be, or shall usually reside: Provided, that nothing therein contained shall extend to the compelling the attendance of any witness, unless the party, on whose behalf such witness shall be required to attend, shall have previously tendered to such witness such allowance for expenses for his attendance, as in the judgment of the Court or of a commissioner thereof shall appear to be reasonable. § 66, after re-enacting that, in case any assignee or *other person* shall disobey any rule or order of the Court duly made for enforcing the purposes and provisions of that Act, the Court may order the person so offending to be arrested and committed as for contempt to the Queen's prison,[5] or to the common gaol of any county, city, or place, where he shall be or usually reside, there to remain without bail until he shall fulfil the duty required, or until the Court shall

[1] As to their powers, see §§ 62, 63, 74 of the Act.

[2] As to their powers, see §§ 70, 72, et seq., of the Act.

[3] The process used is a writ of subpœna, purporting to be witnessed by the chief commissioner of the Insolvent Debtors' Court, and actually signed by the clerk of that court. It resembles the ordinary subpœna.

[4] 5 & 6 Vict., c. 22.

[5] Id.

make order to the contrary;—provides, that nothing therein contained shall authorise a commissioner of the Court acting *out of court* upon summons to commit any person for disobedience of any order of the Court, or of any commissioner thereof. § 107 enacts, that the justices mentioned in the Act shall have the same powers of compelling the attendance of witnesses, and of requiring and compelling the production of books, papers, and writings for the purposes of the Act, as are given to the Court and the commissioners, subject to such provisions and limitations as the same are made subject to; and in all cases where the duplicate of any petition and schedule shall have been lodged with the clerk of the peace or his deputy, or with the town-clerk or other officer in the manner mentioned in § 106, such clerk of the peace or his deputy, or such town-clerk or other officer, is thereby authorised to issue all such subpœnas under the Act as may be requisite, in each of which the names of not more than four persons shall be inserted, and to receive for such subpœna from the person requiring the same, the sum of two shillings and sixpence, and no more.

§ 1176. Besides the above powers, the commissioners of the Insolvent Debtors' Court, have now, by virtue of the Act of 10 & 11 Vict., c. 102,[1] like powers for enforcing the attendance of witnesses, in all matters of insolvency and debt under the Acts of 5 & 6 Vict., c. 116, 7 & 8 Vict., c. 96, and 8 & 9 Vict., c. 127, as were formerly exercised by the commissioners of bankrupts under the same Acts;[2] provided the debtor or defendant

[1] See §§ 4, 6, 8.

[2] As to these, see 7 & 8 Vict., c. 96, which, amending the Act of 5 & 6 Vict., c. 116, empowers parties not subject to the bankrupt laws to petition for protection from process; and then enacts, in § 5, that upon such petition being filed, the commissioner shall possess the like power and authority to compel the attendance of, and to examine, such petitioner and his wife, and every person known or suspected to have any of the property of such petitioner in his possession, or who is supposed to be indebted to such petitioner, and every person whom the commissioner believes capable of giving any information concerning the person, trade, business, calling, dealings or property of such petitioner, or any information material to the full disclosure of the dealings of such petitioner, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings,

shall have resided for the last six months within twenty miles of the London Post-office.

§ 1177. The mode of compelling witnesses to attend before the *County Courts*, is mainly regulated by the Act of 9 & 10 Vict., c. 95, which after enacting in § 85, that "either of the parties to the suit or any other proceeding under this Act may obtain, at the office of the 'registrar'[1] of the court, summonses to witnesses, to be served by one of the bailiffs of the court, with or without a clause requiring the production of books, deeds, papers, and writings in their possession or control;" and that, "in any such summons any number of names may be inserted;"—goes on to provide, by § 86, "that every person on whom any such summons shall have been served, either personally or in such other manner as shall be

and other documents, as by any law now in force relating to bankrupts are possessed by the several courts authorised to act in the prosecution of fiats in bankruptcy touching the seizure of property, and the examination of any bankrupt or other person under a fiat in bankruptcy. See also § 53 of the same Act. See further 8 & 9 Vict., c. 127, which is an Act for better securing the payment of small debts, and which enacts, in § 18, "that either of the parties to the suit or any other proceeding before any such commissioner or in any such court may obtain summonses to witnesses, to be served by a messenger or bailiff, with or without a clause requiring the production of books and writings in their possession or control; and in any such summons any number of names may be inserted; and every person on whom any such summons shall be personally served within the jurisdiction of the Court, and to whom, at the same time payment or tender of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the Court of Bankruptcy or judge of any such court as aforesaid, as the case may be, with the approval of one of Her Majesty's principal Secretaries of State, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books or writings required by such summons to be produced; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding five pounds, as the commissioner or judge shall set on him; and payment of such fine shall be enforced in like manner as payment of any debt recovered by judgment of any court of competent jurisdiction; and the whole or any part of such fine in the discretion of the judge, after deducting the costs, shall be applicable toward indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be applicable to the expenses of the court in which the fine was imposed."

[1] See 19 & 20 Vict., c. 108, § 8.

directed by the general rules or practice of the Courts,[1] and to whom, at the same time, payment or a tender of payment of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the general rules of practice of the Court,[2] and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine, not exceeding *ten pounds*, as the judge shall set on him; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable toward indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the general fund of the court in which the fine was imposed." The Act contains no provision respecting witnesses who live beyond the jurisdiction of the Court, but in these cases, the practice is for the registrar to transmit the summons to the bailiff of the district in which the witness resides, and the process is then served like an ordinary foreign summons.[3] The legality of this practice may possibly be questionable.

§ 1178. The County Courts, like the Insolvent Debtors' Court, have also now jurisdiction in certain cases of insolvency and debt which were formerly under the jurisdiction of the courts of bankruptcy; and in these cases they may exercise such powers for enforcing the attendance of witnesses as were heretofore exercised by the commissioners of bankrupts.[4]

§ 1179. By the Act of 6 & 7 Vict., c. 18, §§ 35, 50, and 51,

[1] Under the County Court Rules 45 and 58, the service may be either personal or by delivering the summons "to some person, apparently sixteen years old, at the house, or place of dwelling, or place of business" of the witness; but no place shall be deemed his place of business, unless he be the master or one of the masters of it.

[2] Ante, p. 998, n. 2.

[3] See and compare County Court Rules, 12, 24, 58, and 74; and qu., as to the power of the judges to make the last rule.

[4] 10 & 11 Vict., c. 102, §§ 4, 6, 8. See ante, § 1176.

revising barristers are empowered to require, by summons under their hands, the attendance of assessors, overseers, and relieving and other parish officers, who, in the event of their disobedience, are liable, upon proof of the service of the summons, to be fined by the barristers any sum not exceeding five pounds, nor less than twenty shillings.[1]

§ 1180. The attendance of witnesses before *arbitrators* is regulated in England by §§ 39 and 40 of 3 & 4 Will. 4, c. 42, and in Ireland by §§ 63 and 64 of 3 & 4 Vict., c. 105; which sections respectively enact, that, where any reference shall have been made by any rule of court, or judge's order, or order of Nisi Prius in any action, or by any submission to reference containing an agreement that it shall be made a rule of court, the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or any judge, may, by rule or order, command the attendance and examination of any person, or the production of any documents, mentioned therein; and the disobedience of such rule or order shall be deemed a contempt of Court, if, in addition to the service of the same, an appointment of the time and place of attendance, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with, or after the service of, such rule or order: Provided that every person whose attendance is required, shall be entitled to the like conduct-money, and payment of expenses, and for loss of time, as upon attendance at any trial; that the application made to the Court or judge for such rule or order, shall set forth the county where the witness is residing at the time, or satisfy the Court or judge that he cannot be found; and that no person shall be compelled to produce, under any such rule or order, any writing or other document that he might have withheld at a trial, or to attend on more than two consecutive days, to be named in the order.

§ 1181. Under the Act to encourage the establishment of district courts and prisons, certain disputes may be referred to

[1] See also the Irish Act of 13 & 14 Vict., c. 69, §§ 56 & 57.

arbitration, and in that event, the arbitrator is empowered to summon before him such persons as he may require, and to examine them upon oath.[1] So, official referees, under the Metropolitan Buildings' Act, may, by their summons in writing, sealed with the seal of the registrar of metropolitan buildings, require the attendance of any person to give evidence and to produce documents; and in the event of disobedience, the party may be proceeded against as for a contempt of court, provided he has been paid or tendered his expenses, and has been served, in addition to the summons, with an appointment of the time and place of attendance, signed by at least one of the referees.[2]

§ 1182. It has been stated in a former part of this work,[3] that under the provisions of the Acts of 13 Geo. 3, c. 63, 1 Will. 4, c. 22, and 3 & 4 Vict., c. 105, § 66, the judges at Westminster and Dublin respectively are authorised to grant *writs of mandamus* or *commissions* to the judges of India, of the colonies, and of other places under her Majesty's dominion, empowering them to examine witnesses in certain cases; and § 2 of the second named, and § 67 of the last named Act, respectively provide, that whenever any such writ or commission shall issue, "the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the Court, whereof they are judges, does or may possess for that purpose in causes or suits depending in such court." It has further been shown,[4] that each of the Superior Courts at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, and the several judges thereof, may, under § 4 of 1 Will. 4, c. 22, and each of the Superior Courts at Dublin, and the several judges thereof, may, under § 69 of 3 & 4 Vict., c. 105, order witnesses *within the jurisdiction of the court* wherein an action shall be depending, to be examined on interrogatories or otherwise before the Master of the court, or such other person as shall be appointed; and § 5 of the former, and § 70 of the latter Act provide, that when any rule or order shall be made for this

[1] 5 & 6 Vict., c. 53, § 32.
[2] 7 & 8 Vict., c. 84, § 85.
[3] Ante, §§ 466—479.
[4] Ante, § 472.

purpose, "it shall be lawful for the Court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment, (the judge's order being made a rule of court before or at the time of the application for the attachment,) if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person, whose attendance shall be so required, shall be entitled to the like conduct-money, and payment for expenses, and loss of time, as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document, that he would not be compellable to produce at a trial of the cause." § 7 of the one Act, and § 72 of the other, require that the examination of witnesses shall be taken on oath or affirmation, to be administered, either by the examiner, or by a judge of the court wherein the action shall be depending; and the usual clause is added, that witnesses giving false evidence shall be guilty of perjury; while §§ 8, and 73, respectively require the examiner, "to make, if need be, a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the Court is authorised to institute such proceedings, and make such orders upon the report as justice may require, and as may be instituted and made in any case of contempt of the Court."[1]

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[1] § 11 provides, that no order shall be made in pursuance of this Act by a single judge of the Court of Pleas at Durham, unless he be also a judge of one of the Courts at Westminster.

§ 1182 A. All the provisions cited in the last section which are applicable to the examination of witnesses under the commissions and orders of courts of law, have, as before stated, been recently extended to the English and Irish Courts of Probate, and the Court for Divorce and Matrimonial Causes.[1]

§ 1183. Although the Acts of 1 Will. 4, c. 22, and 3 & 4 Vict., c. 105, thus contain provisions for enforcing the attendance of witnesses, either before the colonial judges, when acting as commissioners, or before examiners, when acting within the jurisdiction of the Court appointing them, neither of these statutes affords any means for compelling witnesses to attend and be examined under any commission, which is to be executed in some part of the United Kingdom beyond the jurisdiction of the Court from which the commission issues. An Act, however, was passed in the year 1843 to remedy this defect;[2] which,—after reciting that "there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the Courts of Law or Equity in England or Ireland, or by the Courts of Law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof,"—enacts,[3] that "if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid, (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners; and it shall thereupon be competent to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid, to appear before such commis-

[1] See ante, § 479 A. [2] 6 & 7 Vict., c. 82. [3] § 5.

sioner or commissioners, and to be examined under such commission; and it shall be lawful for the Court or judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned, in such rule or order." The same Act further enacts,[1] that "upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties, as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland, it shall be competent to the Lord Ordinary on the bills, upon an application made to him, by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order." The Act then further provides,[2] that "every person, whose attendance shall be so required, shall be entitled to the like conduct-money and payment of expenses and for loss of time, as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other document, that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order."[3]

§ 1184. The Acts of 11 & 12 Vict., c. 42, and 11 & 12 Vict., c. 43, which were passed in the year 1848, contain clauses of much importance, as regulating, in two large classes of cases, the mode

[1] 6 & 7 Vict., c. 82, § 6. [2] § 7.

[3] As to the power of enforcing the attendance of witnesses before examiners appointed to take evidence in Her Majesty's dominions in relation to civil or commercial matters pending before foreign tribunals, see 19 & 20 Vict., c. 113, cited ante, § 494 A.

of enforcing the attendance of witnesses before *Justices of the Peace.* The first-named Act, which was passed to facilitate the performance of duties by magistrates out of sessions with respect to *persons charged with indictable offences,* enacts, in § 16, that "if it shall be made to appear to any Justice of the Peace by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice may and is hereby required to issue his *summons*[1] to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and *no just excuse* shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode) it shall be lawful for the justice or justices, before whom such person should have appeared, to issue a *warrant,*[2] under his or their hands and seals, to bring and have such person at a time and place to be therein mentioned, before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned,[3] in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath or affirmation that it is *probable* that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons,

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[1] See form in Sched. to Act, L 1. [2] See form in Sched. to Act, L 2.

[3] As to the backing of these warrants, see post, § 1186.

it shall be lawful for him to issue his *warrant*[1] *in the first instance*, and which, if necessary, may be backed as aforesaid;[2] and if on the appearance of such person so summoned before the said last-mentioned justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant[3] under his hand and seal *commit* the person so refusing to the common gaol or house of correction for the county, riding, liberty, city, borough, or place where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding *seven days*, unless he shall in the mean time consent to be examined, and to answer concerning the premises."

§ 1185. The Act of 11 & 12 Vict., c. 43,—which, subject to some exceptions to be presently mentioned,[4] relates to *summary convictions and orders* by justices out of sessions,—contains, in § 7, similar provisions for enforcing the attendance of witnesses; excepting only that, before the justice can issue his warrant for the apprehension of a witness who has disobeyed a summons, proof upon oath or affirmation must be given, that "a reasonable sum was paid or tendered to the witness for his costs and expenses in that behalf."

§ 1186. If the witness, against whom any warrant shall be issued under either of these Acts, shall not be found within the jurisdiction of the justice issuing the same, or "if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place beyond such jurisdiction, whether in England, Wales, Ireland, Scotland, or the Channel Islands, any justice or other officer, within whose jurisdiction the witness shall be, or be

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[1] See form in Sched. to Act, L 3.
[2] See post, § 1186.
[3] See form in Sched. to Act, L 4.
[4] Post, § 1187.

supposed to be, may, "upon proof alone being made on oath of the handwriting of the justice issuing such warrant," make an indorsement[1] on the same, authorising its execution within his jurisdiction; and the warrant so backed may then be executed as if it had originally issued in such last-mentioned place.[2]

§ 1187. It has been stated just above, that the Act of 11 & 12 Vict., c. 43, does not apply to all summary convictions and orders. The main *exceptions* are pointed out in § 35[3] of the Act, and consist of orders of removal; orders with respect to lunatics; informations, complaints, and other proceedings under any Act relating to the excise, customs, stamps, taxes, or post-office; bastardy orders and warrants; and proceedings under the statutes which regulate the labour of children in factories. With respect, however, to orders of removal and bastardy orders, justices may enforce the attendance of witnesses by *summons* and *warrant* under 7 & 8 Vict., c. 101, § 70, which enacts, that, "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of that Act, or of any of the Acts required to be construed as one Act therewith,"[4] (that is, 5 & 6 Vict., c. 57; 4 & 5 Will. 4, c. 76; 5 & 6 Will. 4, c. 69; 6 & 7 Will. 4, c. 96; 1 & 2 Vict., c. 56, §§ 118—122; 1 & 2 Vict.,

[1] See form in Sched. to 11 & 12 Vict., c. 42, K.

[2] 11 & 12 Vict., c. 42, §§ 11—16; 11 & 12 Vict., c. 43, §§ 3, 7.

[3] Which enacts, that "nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person, who is or shall become chargeable to any parish, township, or place; nor to any complaints or orders made with respect to lunatics, or the expenses incurred for the lodging, maintenance, medicine, clothing, or care of any lunatic or insane person; nor to any information or complaint or other proceeding under or by virtue of any of the statutes relating to Her Majesty's revenue of excise or customs, stamps, taxes, or post-office; nor shall anything in this Act extend or be construed to extend to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to the backing of warrants for compelling the appearance of such putative father, or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same; nor shall anything in this Act extend to any proceedings under the Acts of Parliament regulating or otherwise relating to the labour of children and young persons in mills or factories."

[4] § 74; 5 & 6 Vict., c. 57, § 18.

c. 25, § 2; 7 Will. 4 & 1 Vict., c. 50; and 2 & 3 Vict., c. 84, except so far as the provisions of any former Act shall have been expressly altered or amended by the provisions of any subsequent Act), "if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to *summon* such person to appear, and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or tendered to such person, it shall be lawful for such justice, by *warrant* under his hand and seal, to require such person to be brought before him, or any justice before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and, in case of such submission, the order of any such justice shall be a sufficient warrant for the discharge of such person."

§ 1188. So, in all proceedings under the Acts "regulating or otherwise relating to the labour of children and young persons in mills and factories," magistrates are empowered to compel witnesses to attend by summons and warrant.[1]

§ 1189. In most of the other cases excepted out of the Act of 11 & 12 Vict., c. 43, the Legislature, while authorising the justices to *summon* the witness, has given them *no power to issue a warrant*, but has enabled them to punish disobedience by the infliction of a *fine*. Thus, the recent Act for consolidating the

[1] 7 & 8 Vict., c. 15, § 49; 3 & 4 Will. 4, c. 103, § 38; 8 & 9 Vict., c. 29, §§ 36, 37, amended by 9 & 10 Vict., c. 18, and 10 & 11 Vict., c. 70. Under § 50 of the first-named Act, inspectors and sub-inspectors may summon witnesses, the form of the summons being given in Sched. D.

laws of the customs renders a witness who disobeys the summons of a justice liable to such penalty, not exceeding 50*l.*, as the justice shall think fit to impose.[1] Somewhat similar clauses are contained in the statutes which respectively relate to the excise,[2] and the post office;[3] but under the former Act the penalty is fixed definitively at 50*l.*, and under the latter at 10*l.* A fine of 10*l.* is also imposed on refractory witnesses by several other statutes, which, with more or less particularity, relate to the revenue.[4] The Acts which now regulate proceedings with respect to lunatics,[5] contain no clause enabling magistrates to enforce the attendance of witnesses,

[1] 16 & 17 Vict., c. 107, § 274, enacts, that "any justice before whom any complaint or information under this or any other Act relating to the customs shall be judicially brought, may summon any person required as a witness, wherever in the United Kingdom such person shall be or reside, to appear before him or any other justice or justices to testify what he shall know concerning the matter of such complaint or information; and if any person so summoned shall refuse or neglect to appear at the time and place appointed by such summons, and no just excuse shall be offered for such neglect or refusal, then, after proof upon oath or affirmation that such summons was duly served upon such person, either personally or by leaving the same at his last or usual place of abode, or on board any ship to which such person may belong, or who having appeared according to the exigency of such summons shall refuse to take oath, or, if a quaker or other person having legal power to make affirmation, refuse to affirm, or shall refuse to give evidence, or to answer according to the best of his knowledge and belief any legal question required of him, such person shall for every such default or offence forfeit such sum not exceeding fifty pounds as such justice shall see fit."

[2] 7 & 8 Geo. 4, c. 53, § 74.

[3] 7 Will. 4 & 1 Vict., c. 36, § 20, enacts, that "every person who shall be summoned as a witness to give evidence before a justice of the peace, or before justices at sessions, touching the matters alleged in or relating to an information, complaint, appeal, or other proceeding depending before such justice or justices for the recovery of a postage, postage debt, or penalty under the Post Office Acts, who shall neglect or refuse to appear before such justice or justices at the time and place to be for that purpose appointed, without a reasonable excuse for such neglect or refusal, to be allowed by such justice or justices, and every person so summoned who shall appear, but shall refuse to be examined and give evidence before such justice or justices touching the matters aforesaid, shall forfeit ten pounds."

[4] See 11 Geo. 4 & 1 Will. 4, c. 64, § 20, as to beer-houses; 2 & 3 Will. 4, c. 120, § 111, and 16 & 17 Vict., c. 88, as to post-horses; 50 Geo. 3, c. 41, § 32, as to hawkers and pedlars; 52 Geo. 3, c. 93, Sch. L, rule 14, as to game certificates.

[5] 8 & 9 Vict., c. 100; 16 & 17 Vict., cc. 96, 97.

either by warrant or fine; and, therefore, in cases under these Acts, the most prudent, if not the only,[1] course for the parties to adopt is to summon the witness in the first instance, and, if he refuses to attend, to direct that he shall be served with a subpœna, which may be obtained from the clerk of the peace, if the witness lives within the jurisdiction of the justices, or from the Crown Office, if he resides in another county.[2]

§ 1190. Since the year 1848, several statutes have passed, which authorise justices in particular inquiries to compel the attendance of witnesses by summons and warrant, as, for example, the Act of 12 & 13 Vict., c. 92, § 17, which aims at the more effectual prevention of cruelty to animals. Other statutes, again, adopt the system of fines; and among these may be mentioned the "City of London Sewers Act, 1848,"[3] and the Act for preventing contagious disorders among cattle,[4]—the one fixing the fine at twenty shillings, and the other specifying 5*l.* as the maximum penalty.[5]

§ 1191. Notwithstanding the general language of the Acts, which empower justices to compel the attendance of witnesses by summons and warrant, it is clear that they can, in general, only exercise this power within the limits of their own jurisdiction; and, therefore, whenever the witness lives beyond such limits, recourse must be had, either to the cumbrous system of backed warrants,[6] or to the Crown Office subpœna, except in the very

[1] See 2 Burn's Justice, by Chitty, 447; Dickenson's Quarter Sess. 127; Dalt. Just. p. 441, ed. 1697, c. 169, § 6; id. p. 24, c. 6; Evans *v.* Rees, 12 A. & E. 55; 4 P. & D. 32, S. C.

[2] See R. *v.* Lydeard St. Lawrence, 11 A. & E. 627, per Lord Denman; R. *v.* Greenaway and R. *v.* Carey, 7 Q. B. 126. It deserves notice, that by 15 Geo. 3, c. 39, any justice is empowered to administer an oath to any person, when any statute directs a penalty to be levied, or a distress to be made, provided such justice be acting under the authority of such statute; and, possibly, this enactment might be held, by implication, to empower the justice to enforce the attendance of all material witnesses by summons and warrant. Sed qu.

[3] 11 & 12 Vict., c. 163, § 258.

[4] 11 & 12 Vict., c. 107, § 15, continued by 16 & 17 Vict., c. 62.

[5] For another instance, see 16 & 17 Vict., c. 112, § 66, Dublin Hackney Carriage Act.

[6] Ante, § 1186.

few instances, where, as in the Acts relating to the excise,[1] and customs,[2] and to the trade of tanners,[3] power is expressly given to the justices to issue process beyond their jurisdiction.

§ 1192. A somewhat important provision of the Irish Statute, 1 & 2 Will. 4, c. 44, may here be mentioned. § 8 enacts, that it shall be lawful for every court in Ireland, having by law jurisdiction over criminal offences, upon proof being made of the service, either personally, or at the residence of the person required to attend, of any summons to appear and give evidence in such court touching any offence, to impose upon the person so served, in case of his disobeying such summons, such fine as the Court shall in its discretion think proper.

§ 1193. Several Acts of Parliament give to commissioners, inspectors, sheriffs, and other officers, more or less stringent powers to enforce the attendance of witnesses before them. Thus, whenever it is necessary for the Commissioners of Customs, or their officers, to institute an inquiry relating to any business under their management, they are empowered to summon any person required as a witness to appear before them and to give evidence on oath; and if such person, having his reasonable expenses tendered to him, refuses to attend, or otherwise misbehaves, he renders himself liable to a penalty of twenty pounds.[4] The *Poor Law Commissioners*, both for England and Ireland, and the inspectors respectively appointed by them, may summon any person for the purpose of being examined upon any matter under their control, or of producing or verifying any document relating to such matter; and in the event of such person disobeying such summons, or refusing to give evidence, or

[1] 7 & 8 Geo. 4, c. 53, § 74, empowers the commissioners of excise, the justices, and commissioners of appeal, to summon any witness, "in whatever part of the United Kingdom he may reside or be."

[2] 16 & 17 Vict., c. 107, § 274, cited ante, p. 1061, n. 1.

[3] 41 Geo. 3, c. 53, § 10, enables justices to summon witnesses, "although such persons shall not at the time of such summons be within the jurisdiction of such justices," "provided that no person shall be obliged to travel by reason of such summons more than six miles."

[4] 16 & 17 Vict., c. 107, §§ 38, 39.

wilfully altering, suppressing, concealing, destroying, or refusing to produce any such document, he shall be deemed guilty of misdemeanor: Provided always, that no person shall be required to travel more than ten miles in England, or twenty miles in Ireland, from his place of abode; and if he be summoned by an English inspector, he shall be allowed his expenses.[1] The Commissioners and inspectors under the Charitable Trusts Acts of 1853 and 1855, possess somewhat similar powers for enforcing the attendance of particular witnesses.[2] The *Commissioners*, too, for sale of *incumbered estates* in Ireland may, by summons under their seal, require witnesses to attend before them, at a time and place to be mentioned in such summons, and to produce all deeds and other documents relating to any question before them; and if such witnesses disobey such summons, they will be liable to be dealt with as if they had disobeyed the Irish Court of Chancery.[3]

§ 1194. Again, the *Inclosure Commissioners*, or any assistant-commissioner, may, by summons under the seal of the Commission, or under the hand of such assistant-commissioner, require the attendance of witnesses before themselves, or if the summons be under seal, before the valuer; and every such witness, in case of disobedience, or other misconduct in refusing to be sworn or to give evidence, is liable to a penalty not exceeding ten pounds, to be levied and recovered before two justices of the county in which the land to be inclosed is situate; and he will also be deemed guilty of misdemeanor; but he must be paid or tendered the reasonable charges of his attendance, and he need not travel above ten miles from the place of his abode.[4] So, when landowners refuse to treat with commissioners of sewers, these last may issue their warrants to the sheriff to impanel a compensation jury to attend the sessions; and, thereupon, the

[1] 10 & 11 Vict., c. 109, §§ 11, 21, 26; 4 & 5 Will. 4, c. 76, §§ 13, 14; 10 & 11 Vict., c. 90, §§ 19, 20, Ir.; 14 & 15 Vict., c. 68, §§ 16, 17, Ir.

[2] See and compare 16 & 17 Vict., c. 137, §§ 10—14, and 18 & 19 Vict., c. 124, §§ 6—9.

[3] 12 & 13 Vict., c. 77, § 12.

[4] 8 & 9 Vict., c. 118, §§ 9, 39, 40, 159, 164. See also 41 Geo. 3, c. 109, §§ 33, 34.

Clerk of the Peace, or his deputy, shall summon all such persons as shall be thought necessary to be examined as witnesses, who, if they do not appear, or if they refuse to be sworn or to be examined, without lawful excuse to be allowed by the sessions, shall forfeit a sum not exceeding five pounds for every such offence.[1] So, in the Act passed in 1843 to enable the Crown to acquire lands for naval purposes, if parties refuse to treat with the commissioners thereby appointed, the sheriff, under-sheriff, or sheriff-depute, as in the last case, may summon a compensation jury to attend before him; and such officer, instead of the Clerk of the Peace, is further authorised to summon the witnesses, who, if they disobey, &c., are liable to a penalty not exceeding fifty pounds, to be imposed by some justice on proof of the offence.[2] So, under "the Preliminary Inquiries' Act, 1851," the inspectors appointed by the Lords Commissioners of the Admiralty, are empowered to summon any persons, whose evidence in their judgment shall be material; and if such persons wilfully neglect or refuse to attend in pursuance of such summons, or to produce such documents as they may under the Act be required to produce, they become liable to a penalty not exceeding five pounds.[3] So, every special inspector appointed under the Merchant Shipping Act, 1854, may, by summons under his hand, require the attendance of witnesses before him; and every person who refuses to obey such summons, after having his expenses tendered to him, becomes liable to a penalty not exceeding ten pounds.[4]

§ 1195. Where *commissioners* are appointed under the Act of 42 Geo. 3, c. 106, to take evidence in Ireland respecting *Irish controverted elections*, the chairman of the commission is empowered, at all times, by warrant under his hand and seal, to send for all persons, papers, and records; and the commissioners may examine the witnesses on oath, and exercise the same powers as are enjoyed by select committees of the House of Commons

[1] 3 & 4 Will. 4, c. 22, §§ 26, 27. § 29 provides by whom the costs of the witnesses are to be paid. See 4 & 5 Vict., c. 45, §§ 13, 14.

[2] 6 & 7 Vict., c. 58, §§ 8, 13. [3] 14 & 15 Vict., c. 49, §§ 4, 5.

[4] 17 & 18 Vict., c. 104, § 15.

in controverted elections.[1] § 28 authorises the chairman, "by warrant under his hand and seal, directed to any one or more constable or constables, or to any other person or persons specially appointed by such chairman, to summon and require the attendance of any witnesses or other persons before the commissioners, at the day and place to be mentioned in the warrant;" while § 29 enacts, that "if any person so summoned as a witness shall neglect or refuse to attend, without lawful excuse to be determined by the said commissioners,—or if any witness before such commissioners shall prevaricate, or shall otherwise misbehave in giving or refusing to give evidence,—or if any person shall be guilty of any contempt or misbehaviour whatsoever of or towards the said commissioners, while sitting and acting in the execution of their said commission, the said chairman of the said commissioners shall, and he is hereby empowered, by a warrant under his hand and seal, and directed to the gaoler of the common gaol of the county or place in which the said commissioners shall sit, to commit such person (not being a Peer of the realm or a Lord of Parliament) to the custody of the said gaoler, without bail or mainprize, for any time not exceeding six calendar months." § 30 enacts, that "in case it shall be requisite to summon any member of Parliament to give evidence before the said commissioners, who shall be then attending his duty in Parliament, the chairman of the commissioners shall certify the same to the Speaker of the House of Commons, who shall report the same to the House."[2]

§ 1196. Commissioners authorised to inquire into the existence of corrupt practices at elections for members of Parliament may, by a summons under their hands and seals, or under the hand and seal of one of them, require the attendance of witnesses and the production of such books, papers, deeds, and writings as they

[1] 42 Geo. 3, c. 106, § 23. See ante, § 1161.

[2] See further as to commissioners empowered to try official persons who have been guilty of offences in India, 24 Geo. 3, c. 25, §§ 74, 75; 26 Geo. 3, c. 57; as to examiners appointed to take depositions de bene esse, 24 Geo. 3, c. 25, § 81, and 42 Geo. 3, c. 85, § 3; and as to commissioners appointed under the Act for regulating the care and treatment of lunatics, 8 & 9 Vict., c. 100, §§ 100, 101.

may deem necessary;[1] and if any such summons be disobeyed, the commissioners may certify the default to one of the superior Courts, who will deal with the offender as if he had disobeyed an ordinary subpœna.[2]

§ 1197. It has already been shown,[3] that the Superior Courts of Law and the Superior Judges are respectively empowered, by rule or order, to command the attendance of witnesses before a Master of those Courts, for the purpose of being examined, or the production of any documents, under the Act of 1 Will. 4, c. 42, § 4;[4] and it may be further noticed, that, under the Common Law Procedure Act, 1854,[5] a similar mode of proceeding may be adopted, whenever, upon the hearing of any motion or summons, the oral examination of any witness before the Master is directed,[6] or whenever a person who refuses to make an affidavit, is ordered to be examined upon oath before a Master,[7] or whenever the oral examination of a party who has omitted to answer his opponent's written interrogatories, is directed to take place before a Master,[8] or whenever, at the instance of a creditor, a judgment debtor is ordered to be orally examined before a Master, as to what debts are owing to him.[9] The Common Law Procedure Act, 1852,[10] also provides, that when an inquiry respecting the amount of unliquidated damages is directed to be had before a Master, "the attendance of witnesses, and the production of documents, before such Master may be compelled by subpœna, in the same manner as before a jury upon a writ of inquiry."[11] It seems that, at Common Law, the Superior Courts have no power to enforce the attendance of witnesses before a Master.[12]

§ 1198. It were an easy task to expand to a tenfold length the foregoing summary of the statutes regulating the attendance of witnesses; but it is hoped that what has already been

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[1] 15 & 16 Vict., c. 57, § 8. [2] § 12. [3] Ante, § 1182.
[4] The Irish Act 3 & 4 Vict., c. 105, § 69, contains similar provisions.
[5] 17 & 18 Vict., c. 125. The Irish Act 19 & 20 Vict., c. 102, contains in §§ 51, 52, 53, 54, 58, and 59, similar provisions.
[6] 17 & 18 Vict., c. 125, §§ 46, 47. [7] Id. §§ 48, 49.
[8] Id. §§ 53, 54. [9] Id. § 60. [10] 15 & 16 Vict., c. 76.
[11] § 94. [12] M'Dougall v. Nicholls, 4 Dowl. 76, per Coleridge, J.

said will, in some measure, serve two purposes. First, it will furnish something like a guide to the practitioner, in ordinary cases, where witnesses are required to be examined; and secondly, it may suggest the expediency of amending the existing law to those who are able and willing to effect the necessary change. No one can contemplate the infinite variety of forms of proceeding, which must now be resorted to by all inferior courts and functionaries, in order to enforce the attendance of witnesses, without recognising the advantages that would accrue, were the Legislature to pass, as it easily might do, some general Act, which should render the practice on these points clear, simple, and uniform.

§ 1199. In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of the judicial proceeding;[1] but—in common with parties, barristers, attorneys, and, in short, all persons who have that relation to a suit which calls for their attendance,[2] —they are[3] *protected from arrest* upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home; *eundo, morando, et redeundo.*[4] The service of a subpœna or other process is not necessary in order to afford the witness this protection, provided he has consented to come without such service,[5] and actually

[1] Revis v. Smith, 18 Com. B. 126.

[2] The privilege does not apply to an attorney's clerk attending at Judge's Chambers. Phillips v. Pound, 7 Ex. R. 881.

[3] Gr. Ev., § 316, slightly as to six lines.

[4] Meekins v. Smith, 1 H. Bl. 636; Walpole v. Alexander, 3 Doug. 45. In ex parte Britten, 1 Mon. D. & D. 278, the husband of a petitioner, who accompanied his wife to the Court of Review to attend the hearing of the petition, was held to be privileged from arrest; since being liable to the costs of the application, he had such a relation to the suit as fully justified his attendance.

[5] Arding v. Flower, 8 T. R. 536, per Lord Kenyon; Ex parte Byne, 1 Ves. & B. 320; Rishton v. Nisbett, 1 M. & Rob. 347, per Alderson and Taunton, Js. But see Magnay v. Burt, 5 Q. B. 393, where Tindal, C. J., observed that the privilege had been disallowed, where the party attended as a volunteer, and not upon process. See also Salk. 544.

does attend in good faith;[1] and, therefore, the privilege extends to a witness coming from abroad without a subpœna.[2] In determining what constitutes a reasonable time for going, staying, and returning, the Courts are disposed to be liberal; and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party went as quickly as possible and by the nearest route.[3] Thus the rule of protection has been held to apply, where a witness, two hours after he had left the court, was arrested about a mile off in the direct road to his house;[4] where a defendant, who had attended his cause in the morning, went to a tavern near the court in the afternoon, to dine with his attorney and witnesses;[5] where a party had been staying for some days at a coffee-house near the court, waiting for the trial of his cause, which was a remanet, but was not in the list of causes for the day on which the arrest happened;[6] where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day;[7] where a witness, in a cause tried on Friday afternoon, was arrested in the assize town on Saturday evening, as she was entering a stage coach which was to convey her home;[8] where a plaintiff, on leaving court, called at his office for refreshment, and then on his way home went to his tailor's, in whose shop he was arrested;[9] and even where a witness from abroad, on finding that

[1] Meekins *v.* Smith, 1 H. Bl. 637; Walpole *v.* Alexander, 3 Doug. 46, per Lord Mansfield.

[2] Walpole *v.* Alexander, 3 Doug. 45; Norris *v.* Beach, 2 Johns. 294.

[3] Strong *v.* Dickenson, 1 M. & W. 491, per Lord Abinger; Ricketts *v.* Gurney, 7 Price, 704, per Graham, B.; Willingham *v.* Matthews, 6 Taunt. 358; 2 Marsh. 57, S. C.; in re M'Kone, Ir. Cir. R. 65; Smythe *v.* Banks, 4 Dall. 329.

[4] Selby *v.* Hills, 8 Bing. 166. See Ex parte Clarke, 2 Dea. & C. 99.

[5] Lightfoot *v.* Cameron, 2 W. Bl. 1113.

[6] Childerston *v.* Barrett, 11 East, 439; Hurst's case, 4 Dall. 387.

[7] Ex parte Temple, 2 Ves. & B. 395; Ex parte Russell, 1 Rose, 278.

[8] Holiday *v.* Pitt, 2 Str. 986; Gilb. R. 308. "There she was directly on her way home. The Court did not decide that she might not have been arrested at the assize town on Saturday morning." Per Alderson, B., in Strong *v.* Dickenson, 1 M. & W. 490.

[9] Pitt *v.* Coomes, 5 B. & Ad. 1078; 3 N. & M. 212, S. C.; Luntly *v.*

the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival.[1]

§ 1200. On the other hand, where a witness, subpœnaed out of Chancery, was arrested three days before the time fixed for his examination, while going to his attorney's office to look at the interrogatories which he would be called upon to answer;[2] where a party, having come from the country to town to attend an arbitration, remained, after an adjournment of the reference sine die, till the expiration of the fourth day of an approaching term, in expectation of a motion being made by the opposite party relative to the order of reference;[3] and where an attorney, having been arrested during the afternoon at the Auction Mart Coffee House, swore that, having professional business in several causes at Westminster, he went into the City in his way to the courts, but omitted to state either where his house was, or when he left home;[4]—in all these cases the Courts have refused to discharge the party out of custody. So, though it seems that a witness who comes to town to be examined, is protected from arrest during the whole time that he bonâ fide remains there for the purpose of giving evidence,[5] a witness living in London is not protected in the interval between the service of the subpœna and the day appointed for his examination.[6] Neither can the privilege from arrest be prolonged, in consequence of the party's inability to return home for want of pecuniary means,[7] though, possibly, if the detention has been caused by illness, the Court will consider this circumstance in fixing the extent of the protection.[8] In one case, where a party in London, being summoned to attend a reference at Exeter, went, three days before the time of meeting with his attorney to Clifton where his wife lived, to examine

——, 1 Cr. & M. 579; Ahearne v. M'Guire, 2 Ir. Eq. R. 437; Mahon v. Mahon, id. 440.

[1] Walpole v. Alexander, 3 Doug. 45. See also Persse v. Persse, 5 H. of L. Cas. 671.

[2] Gibbs v. Phillipson, 1 Russ. & Myl. 19.

[3] Spencer v. Newton, 6 A. & E. 623; 1 N. & P. 818, S. C.

[4] Strong v. Dickenson, 1 M. & W. 488. See Walsh v. Wilson, 1 Ir. Eq. R., N. S., 610.

[5] Gibbs v. Phillipson, 1 Russ. & Myl. 19.

[6] Id.

[7] Spencer v. Newton, 6 A. & E. 623; 1 N. & P. 818, S. C.

[8] Id.

documents necessary to be produced before the arbitrator, and was arrested on the second day before he had completed the arrangement of his papers, the Courts of King's Bench and Exchequer pronounced opposite decisions, the former holding that he was not, the latter that he was, privileged from arrest.[1]

§ 1201. It would seem that in general this protection extends only to persons arrested on *civil process*, for against criminal process home itself is no protection.[2] Whether a warrant of commitment issued out of a County Court would be regarded in the light of a criminal process, so as to justify the bailiff in arresting a witness, is a question which, after discussion, has been left undecided by the judges.[3] In Ireland, where a witness for the Crown, attending at the Quarter Sessions, was arrested under a writ of commission of rebellion, the Court out of which the process issued, while declining to express any opinion as to whether this writ was in the nature of a criminal proceeding, discharged the witness from custody, and observed that it was highly essential to the interests of the public, that witnesses in criminal courts of justice should be protected and encouraged.[4] A witness is not privileged from being taken by his bail, even during his attendance at court, for this is not an arrest, but a retaking.[5]

§ 1202.[6] This privilege, so far as parties and witnesses are concerned, will be recognised in all cases where the attendance is given in any matter pending before a *lawful tribunal* having jurisdiction

[1] Randall *v.* Gurney, 3 B. & A. 252, Abbott, C. J., diss.; Ricketts *v.* Gurney, 7 Price, 699, per Graham and Wood, Bs., Garrow, B., diss.

[2] Per Lord Denman, In re Douglas, 3 Q. B. 837, 838. It was there held that a warrant issued upon an information ex officio, under the Act of 33 Geo. 3, c. 52, § 62, and expressed to be to answer for certain misdemeanors whereof the party was impeached, and also for certain penalties sued for by the Att.-Gen., was criminal process, under which the party might be taken redeundo after his discharge from illegal custody.

[3] Kimpton *v.* London & North-West. Rail. Co., 9 Ex. R. 766.

[4] Graves *v.* M'Carthy, 1 Cr. & Dix, Abr. Ca. 127.

[5] Ex parte Lyne, 3 Stark. R. 132, per Abbott, C. J.; Horn *v.* Swinford, 1 D. & R. Mag. Ca. 361, per Richards, C. B.

[6] Gr. Ev., § 317, in part.

of the cause. Thus it has been extended to parties and witnesses attending before an arbitrator, whether he be appointed by an order of the Court of Chancery,[1] a rule of one of the common-law courts, a judge's order, an order of Nisi Prius, or an agreement of reference containing a clause that it may be made a rule of court; for, in all these cases, the attendance of witnesses may be enforced.[2] So it applies to a party attending at judges' chambers,[3] or before a Master or Examiner in Chancery,[4] or at the Registrar's office on passing the minutes of a decree,[5] or before the under-sheriff, on the execution of a writ of inquiry;[6] as also to witnesses attending the Insolvent Debtors' Court,[7] the Central Criminal Court,[8] the Court of Bankruptcy,[9] Courts-Martial,[10] the Houses of Parliament, or committees of either House.[11] It will also protect a prosecutor attending Quarter Sessions or Assizes,[12] even after the bill in which he is interested has been ignored, provided this fact has not been publicly announced.[13]

§ 1203. A witness, too, who attends before a *magistrate* or other inferior judicial officer by virtue of a summons or a writ of subpœna, will it seems be privileged from arrest on civil process, eundo, morando, et redeundo;[14] and the same privilege has recently been extended to a person attending before a police magistrate as

[1] Moore *v.* Booth, 3 Ves. 350, 351; List's case, 2 Ves. & B. 374; Ex parte Temple, id. 395; Randall *v.* Gurney, 3 B. & A. 252.

[2] Webb *v.* Taylor, 1 Dowl. & L. 676, per Patteson, J.; Rishton *v.* Nisbett, 1 M. & Rob. 347; Spence *v.* Stewart, 3 East, 89; Sanford *v.* Chase, 3 Cowen, 381.

[3] Moore *v.* Booth, 3 Ves. 350, 351.

[4] Id.; Wheeler *v.* Cox, 3 Ir. Law R. 302, n.; Brown *v.* M'Dermott, 2 Ir. Eq. R. 438.

[5] Newton *v.* Askew, 6 Hare, 319.

[6] Walters *v.* Rees, 4 Moore, 34.

[7] Willingham *v.* Matthews, 6 Taunt. 356; 2 Marsh. 57, S. C.

[8] Newton *v.* Constable, 2 Q. B. 162, per Coleridge, J.

[9] Arding *v.* Flower, 8 T. R. 534; Ex parte King, 7 Ves. 312; Ex parte Clarke, 2 Dea. & C. 99; Ex parte Burt, 2 Mon. D. & D. 666. See also 12 & 13 Vict., c. 106, §§ 112, 113.

[10] 10 & 11 Vict., c. 12, § 15; 10 & 11 Vict., c. 13, § 17.

[11] May, Law of Parl. 110—112, and the journals there cited.

[12] Graves *v.* M'Carthy, 1 Cr. & Dix, Abr. C. 127.

[13] In re M'Kone, Ir. Cir. Rep. 65.

[14] See Webb *v.* Taylor, 1 Dowl. & L. 684, per Patteson, J.; Mountague *v.* Harrison, 27 L. J., C. P., 24; Ex parte Edme, 9 Serg. & R. 147.

a witness on a charge of felony after a remand, though he was not under recognisances or summons to appear.[1] But the rule will not protect a common informer, or any person who voluntarily goes before a justice to obtain a summons against another party for penalties, even though the summons be obtained.[2] In one of the numerous cases respecting Mr. Newton,—who may perhaps claim the unenviable merit of having raised, in his own person, almost as many questions on this subject as all other parties put together,—the judges of the Queen's Bench decided that a barrister was not privileged from arrest, by reason of his attendance on Petty Sessions for the purpose of obtaining practice;[3] and notwithstanding the case of Luntly *v.* ——,[4] and the Act of 6 & 7 Will. 4. c. 14, § 2,[5] they expressed some doubt as to whether the privilege could be extended further than to protect the bar while attending the Superior Courts, or perhaps such counsel as were actually engaged in professional business before the inferior tribunals. Still, in pronouncing the judgment of the Court, Lord Denman thought proper to observe, that "the attendance of parties and of witnesses has always been protected. It is absolutely necessary for the ends of justice that their attendance should be privileged, because, without it, justice cannot be administered. But the protection of legal officers is of a different character, and may well be confined within narrower limits."[6]

§ 1204. Although a party discharged from illegal civil process is privileged from arrest during his return home,[7] the *discharge from criminal process*, even in consequence of an acquittal, confers no such protection, unless it should appear that the apprehension on the criminal charge was a mere contrivance to get the party

[1] Mountague *v.* Harrison, 27 L. J., C. P., 24.

[2] Ex parte Cobbett, 26 L. J., Q. B., 293.

[3] Newton *v.* Constable, 2 Q. B. 157.

[4] 1 Cr. & M. 579, noticed, 2 Q. B. 165.

[5] By which persons liable to summary conviction are empowered to make their defence before justices by counsel or attorneys.

[6] 2 Q. B. 166. See Jones *v.* Marshall, 26 L. J., C. P., 229; 2 Com. B., N. S., 615, S. C.

[7] In re Douglas, 3 Q. B. 837, per Lord Denman; R. *v.* Blake, 4 B. & Ad. 355; 2 N. & M. 312, S. C.

into custody in the civil suit.[1] A distinction, however, has been drawn in Ireland, between the case of a prisoner actually in custody, and a party out on bail; and it has there been held, that a person who attends under a recognisance to answer a criminal charge, and is acquitted and discharged, is privileged from arrest while returning home.[2] The validity of this distinction would probably be questioned in the English courts, since an accused, who surrenders to take his trial, is, during that trial, as much in legal custody as a prisoner who is brought up by the gaoler himself.

§ 1205. If a person entitled to privilege is *unlawfully arrested*, *application* for his *discharge* should be made, either to the court where the cause is depending, in respect of which the privilege is claimed, or to the court out of which the process issued, upon which the arrest takes place; for this last court ought not to suffer its process to be executed, in violation of the privileges of other tribunals.[3] Though the one court should, on motion, refuse to interfere, the person arrested may seek relief from the other;[4] and it would even seem, that, without applying to either of these courts, the arrested party may obtain his discharge by causing himself to be brought by habeas corpus before any one of the superior judges at chambers.[5] Indeed, this last appears to be the proper course to pursue, whenever the witness has been actually

[1] Goodwin *v.* Lordon, 1 A. & E. 378; 3 N. & M. 879; 2 Dowl. 504, S. C.; Hare *v.* Hyde, 16 Q. B. 394; Anon. 1 Dowl, 157: Buckmaster *v.* Cox, 2 Ir. Law Rep. 101; Jacobs *v.* Jacobs, 3 Dowl. 677; In re Douglas, 3 Q. B. 838.

[2] Callans *v.* Sherry, Alc. & Nap. 125; Kelly *v.* Barnewall, Cooke & Alc. 94; Williams *v.* Steele, 4 Law Rec., 1st Ser., 169; Babington *v.* Mahony, 5 Law Rec., 2nd Ser., 232, n.

[3] Att.-Gen. *v.* Skinners' Co., 1 Coop. C. P. R. 1; Kimpton *v.* London & North West. Rail. Co., 9 Ex. R. 766; Randall *v.* Gurney, 3 B. & A. 252; 1 Chitty R. 679, S. C.; Ex parte Clarke, 2 Dea. & C. 99; Ex parte Burt, 2 Mon. D. & D. 666; Walker *v.* Webb, 3 Anst. 941; Selby *v.* Hills, 8 Bing. 166; Bours *v.* Tuckerman, 7 Johns. 538.

[4] Randall *v.* Gurney, 3 B. & A. 255, per Bayley, J.

[5] Ex parte Tillotson, 1 Stark. R. 470, per Lord Ellenborough; Towers *v.* Newton, 1 Q. B. 319, 320, per Rolfe, B., after consulting Parke, B. See Newton *v.* Constable, 2 Q. B. 163, n. *b*.

lodged in gaol before the trial, and is made to appear in court by virtue of a writ of habeas corpus ad testificandum. The judge at Nisi Prius will in such case decline to interfere, as he has no means of ascertaining whether any other grounds of detention exist.[1] Inferior tribunals, such as the Quarter Sessions,[2] Arbitrators,[3] or the Sheriffs' Courts,[4] have no power to discharge arrested persons unless they be arrested in the very face of the Court,[5] and therefore if a witness be taken into custody while attending these tribunals, he must have recourse to the Superior Court out of which the process issued.

§ 1206. In suits depending in Chancery, the motion may be made before the Master of the Rolls, though the cause, in attending which the person was arrested, has been set down for hearing in the list of one of the Vice-Chancellors.[6] If the witness be arrested while attending commissioners of bankruptcy, the Lords Justices who exercise the functions of the Court of Review[7] will now discharge him,[8] though the practice was formerly to apply to the Lord Chancellor.[9] The Houses of Parliament will, of their own authority, discharge all persons unduly arrested, while attending before themselves, or before committees of either House;[10] but witnesses summoned to give evidence before military or marine Courts-Martial, must, in the event of their arrest, apply by affidavit for their discharge either to the court out of which the process issued, or if such court be not sitting, to some judge of the Superior Courts of Westminster or Dublin, or to the Court

[1] Astbury v. Belbin, 3 C. & Kir. 20, per Lord Campbell.

[2] Clerk v. Molineux, T. Raym. 100; 1 Lev. 159; 1 Sid. 269; 1 Keb. 845, S. C.

[3] Walters v. Rees, 4 Moore, 36.

[4] Id.; Wilson v. Sheriffs of London, Brownl. l. 1, p. 15.

[5] Wilson v. Sheriffs of London, Brownl. l. 1, p. 15.

[6] Ahearne v. M'Guire, 2 Ir. Eq. R. 437; Mahon v. Mahon, id. 440. But see Newton v. Askew, 6 Hare, 321, per Wigram, V. C.

[7] See 14 & 15 Vict., c. 83, § 7.

[8] Ex parte Clarke, 2 Dea. & C. 99; Ex parte Burt, 2 Mon. D. & D. 666.

[9] Ex parte List, 2 Rose, 24; 2 Ves. & B. 373, S. C.

[10] May, Law of Parl. 110—112, but the party arrested may apply, if he think fit, to the Court out of which the process issued; Att.-Gen. v. Skinners' Co., 1 Coop. C. P. R. 1.

of Session in Scotland, or to the courts of law in the East or West Indies, or elsewhere, as the case shall require.[1]

§ 1207. It does not appear to be yet clearly determined, *within what time* the motion for discharge must be made, or how far the witness arrested may *waive* his protection. In America, where the protection is regarded as a personal privilege, the party arrested may waive it; and if he willingly submits to be taken into custody, he cannot afterwards object to the imprisonment as unlawful.[2] In Ireland the privilege is considered as bestowed for the good of the public; but there also it has been held, that the application for discharge must be made without delay.[3] In this country the Courts hold, as in Ireland, that the privilege is not the privilege of the *person* attending the court, but of the *court* which he attends, it being established for the benefit of the suitors and the advancement of justice;[4] and they, consequently, appear to have considered that a prisoner cannot, by laches, preclude himself from taking advantage of the illegality of his arrest; and that it is immaterial what interval may have been allowed to elapse between the arrest and the application for discharge, unless, perhaps, in a case where the interests of another party have been prejudiced by the delay.[5] The allowance, however, or the disallowance of the privilege, is always discretionary; and it has been disallowed in collusive, as well as vexatious, actions.[6]

§ 1208. It is now finally decided that *no action*, whether in trespass or on the case, is maintainable against the sheriff or his

[1] See 17 & 18 Vict., c. 4, § 15; id. c. 6, § 17.

[2] Brown *v*. Getchell, 11 Mass. 11, 14; Geyer *v*. Irwin, 4 Dall. 107.

[3] In re ——, 3 Ir. Law R. 301.

[4] Anon., 1 Dowl. 158, per Parke, J.; Magnay *v*. Burt, 5 Q. B. 393, per Tindal, C. J.; Cameron *v*. Lightfoot, 2 W. Bl. 1193, per De Grey, C. J.

[5] Webb *v*. Taylor, 1 Dowl. & L. 684—687, per Patteson, J. In that case 23 days had elapsed. See Greenshield *v*. Pritchard, 8 M. & W. 148, where, after the lapse of a year, the Court refused to interfere, though the party had been arrested under void process.

[6] Magnay *v*. Burt, 5 Q. B. 393; Cameron *v*. Lightfoot, 2 W. Bl. 1193; Rast. 476; Anon. 11 Mod. 79.

officer for arresting a person while attending court as a witness; and this, too, though it be alleged and proved that the arrest was made maliciously, and with ample knowledge of the circumstances.[1] It is also equally clear, that an action of trespass will not lie against the plaintiff or his attorney, who in such a case has intrusted the sheriff with the writ;[2] neither will they be liable to an action on the case, if they have enforced the execution of the process without full knowledge of the privilege of the witness.[3] Whether the fact of knowledge and the proof of actual malice will make any difference in the position of the parties, may admit of much doubt; for although it has been held at Nisi Prius, that under these circumstances, an action on the case is maintainable,[4] this ruling is scarcely reconcileable with the doctrines since laid down by the Exchequer Chamber in Magnay v. Burt.[5] If a witness, who has been improperly arrested, obtains an order from the Court for his discharge, and the sheriff afterwards disobeys this order, an action of trespass may, as it seems, be brought against the officer; for the further detention of the witness, without the authority of any writ to justify it, would become a new trespass and false imprisonment, in the same manner as if there had been a new caption.[6]

§ 1209. Although the witness arrested has no remedy by action, the party arresting him maliciously, and with a knowledge of the existence of his privilege, will not be free from punishment; for he may still have an *attachment* awarded against him for contempt of court.[7] On the same principle, the preventing, or using any means to prevent, a witness duly summoned from attending court,

[1] Magnay v. Burt, 5 Q. B. 381; 1 D. & M. 652, S. C.; Cameron v. Lightfoot, 2 W. Bl. 1190; Tarlton v. Fisher, 2 Doug. 671.

[2] Yearsley v. Heane, 14 M. & W. 322; Ewart v. Jones, id. 774.

[3] Stokes v. White, 1 C. M. & R. 223; 4 Tyrwh. 786, S. C.

[4] Whalley v. Pepper, 7 C. & P. 506, per Littledale, J. See Ewart v. Jones, 14 M. & W. 786, per Pollock, B.: sed qu.

[5] 5 Q. B. 381; 1 D. & M. 652, S. C. See also Vandevelde v. Lluellin, 1 Keb. 220.

[6] 5 Q. B. 395, per Tindal, C. J.

[7] Cameron v. Lightfoot, 2 W. Bl. 1193, 1194; Vandevelde v. Lluellin, 1 Keb. 220; Magnay v. Burt, 5 Q. B. 394, per Tindal, C. J.

is punishable as a contempt,[1] and the endeavouring to intimidate a witness from giving evidence for the Crown in a prosecution, is indictable as a misdemeanor.[2] It will also perhaps be deemed a contempt, to serve a writ of summons upon a witness in the immediate or constructive presence of the Court;[3] though a writ so served cannot be set aside for irregularity.[4]

[1] Com. v. Feely, 2 Virg. Cas. 1.

[2] R. v. Loughran, 1 Cr. & Dix, Cir. R. 79, per Burton, J. See also 27 Geo. 3, c. 15, § 8, Ir.

[3] Cole v. Hawkins, Andr. 275; 2 Str. 1094, S. C.; commented on in Poole v. Gould, 25 L. J., Ex., 250; 1 H. & N. 100, S. C. See also Blight v. Fisher, 1 Peters, C. C. R. 41; Miles v. M'Cullough, 1 Binn. 77.

[4] Poole v. Gould, 25 L. J., Ex., 250; 1 H. & N. 99, S. C.

CHAPTER II.

COMPETENCY OF WITNESSES.[1]

§ 1210.[2] ALTHOUGH, in the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few, and therefore men may in general be disposed to rely upon the statements of each other; yet in judicial investigations, the motives to pervert the truth and to perpetrate falsehood and fraud are so greatly multiplied, that if statements were believed in courts of justice with the same undiscriminating credulity as in private life, much wrong would unquestionably be done. The danger of injustice arising from this cause, which doubtless should induce both judges and juries to watch with cautious suspicion the evidence laid before them, especially when it comes from an interested or polluted source, has, till recently, been thought to justify the observance of a distinction between competent and incompetent witnesses; and, with the view of rendering the evil as inoperative as possible, it was long deemed expedient that the testimony of some particular classes of persons should be uniformly excluded.

§ 1211. If the rules of exclusion, recognised till lately by the English Law, had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature. In rejecting the evidence of parties to the record and other interested witnesses, the law acted on the presumption, not only that such persons, sooner than make a statement which might prejudice themselves, would commit deliberate perjury, but that, if they did so, juries would be incapable of detecting the falsehood. A more unfounded calumny upon the veracity of witnesses, and the

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[1] The question of competency, though involving facts, is one to be determined by the Court alone. See ante, § 22.

[2] Gr. Ev., § 326, in great part as to first seven lines.

intelligence of juries cannot well be imagined. So, also, the disqualification of a witness, which followed his conviction of an infamous crime, rested on the equally fallacious assumption, that having been once guilty of a dereliction of duty, he would ever after be regardless of truth, even though he should have no private interest to serve. It is true that, in modern times, the palpable injustice which a strict adherence to these rules was found to cause, and the consequent growing disposition of the judges to narrow, as far as possible, their effect, and to convert questions of competency into questions of credibility, occasioned the introduction of many exceptions; still the rules, subject to these exceptions, continued to prevail in our courts of justice, and the very exceptions, which were intended to limit their operation, became in their turn productive of frequent injustice. The difficulty of deciding whether any particular witness fell within the rule or the exception was so great, and the consequences of an erroneous decision were so costly and harassing that little practical benefit resulted from the change. If, relying on the opinion of the judge that a certain important witness was competent to testify, a party determined upon calling him, and was thus enabled, in the first instance, to establish a just, or to resist an unjust, claim, it frequently happened that the Court above differed in opinion with the judge who presided at the trial; the consequence of which was, that the verdict was set aside without any regard to the real merits of the case, and the party who had obtained it was driven, at a large expense, and to his infinite annoyance, to seek for a second verdict perhaps equally inconclusive.

§ 1212. Jeremy Bentham, at the commencement of the present century, in vain undertook to expose the abuses of this system, and ventured to assert that, if the discovery of truth were the end of the rules of evidence, and sagacity consisted in the adaptation of means to ends, the sagacity displayed by the sages of law in defining these rules was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as in the line of physical science, the sagacity shown by the peasant was to that evinced by a Newton.[1] Lawyers, wedded

1 Rat. of Judl. Ev. 6.

to a system, which they arrogantly deemed the perfection of reason, listened with impatience to arguments, which, if adopted, would compel them to unlearn the lessons of their youth; while the uninitiated, for the most part, regarded the controversy with indifference, as though, forsooth, it related to a subject in which they had no interest, or else refrained from expressing, if not from forming, an opinion upon matters, respecting which they felt themselves incompetent to decide. The truth is, that, when Mr. Bentham's work on Evidence first made its appearance, the world in general regarded the author as a gentleman who delighted in paradox and wrote bad English, while in the judgment of even the discerning few, this great apostle of judicial reform ranked little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus, by little and little, Mr. Bentham's opinions were at first canvassed, then recognised as correct,[1] and finally, in a great measure, adopted by the Legislature.

§ 1213. The first blow aimed at the old law of incompetency, was dealt in the year 1833 by the Act of 3 & 4 Will. 4, c. 42. §§ 26 and 27, are as follows:—"In order to render the rejection of witnesses on the ground of interest less frequent, be it enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him. And it is further enacted, that the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the

[1] See 1 Ph. Ev. 42—44, where the arguments for and against the rule which excluded witnesses on account of interest are very fairly stated.

record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceedings in which the verdict or judgment shall be offered in evidence."

§ 1214. These sections were, in 1840, re-enacted in an Irish statute;[1] and by furnishing a simple method for restoring the competency of witnesses, who were only so far interested in the event of the action, that the record might in a subsequent suit be evidence for or against themselves, they effected a material amendment in the then existing law, and were hailed by the converts to Mr. Bentham's philosophy, as the harbingers of a far more extensive change. It was not, however, till the session of 1843 that the hopes of these advocates of reform were destined to be realised, when a bill, brought into the House of Lords by Lord Denman, was, after considerable discussion, passed into an Act.

§ 1215. This Act,—after stating in the preamble that "whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony;"—enacts, that "no person offered as a witness shall hereafter be excluded, by reason *of incapacity from crime or interest*,[3] from giving evidence either in person or by deposition,

[1] 3 & 4 Vict., c. 105, §§ 51, 52, Ir.; now repealed by 16 & 17 Vict., c. 113, § 3, and Sched. A.

[2] 6 & 7 Vict., c. 85, passed 22nd Aug. 1843.

[3] It deserves notice that progressive changes in the Scotch law of competency have also been effected of late years. In 1840, the Act of 3 & 4 Vict., c. 59, was passed, which enacts, in § 1, that "it shall, by the law of *Scotland*, be no objection to the admissibility of any witness that he or she is the father or mother, or son or daughter, or brother or sister, by consanguinity or affinity, or uncle or aunt, or nephew or niece, by consanguinity,

according to the practice of the Court, on the trial of any issue joined or of any matter or question, or on any inquiry arising in

of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor shall it be competent to any witness to decline to be examined and give evidence on the ground of any such relationship." This was followed in 1852 by the Act of 15 & 16 Vict., c. 27, which contains, among others, the following enactments :—

§ 1. "No person adduced as a witness in Scotland before any Court or before any person having by law or by consent of parties authority to take evidence, shall be excluded from giving evidence by reason of having been convicted of or having suffered punishment for crime, or by reason of interest, or by reason of agency, or of partial counsel, or by reason of having appeared without citation, or by reason of having been precognosced subsequently to the date of citation; but every person so adduced, who is not otherwise by law disqualified from giving evidence, shall be admissible as a witness, and shall be admitted to give evidence as aforesaid, notwithstanding of any objections offered on the above-mentioned grounds: Provided always, that nothing herein contained shall affect the right of any party in the action or proceeding in which such witness shall be adduced to examine him on any point tending to affect his credibility: Provided also, that it shall not be competent to adduce as a witness in any action or proceeding any person who shall at the time when he is so adduced as a witness be acting as agent in the action or proceeding in which he is so adduced, excepting in so far as the same may be competent by the existing law and practice of Scotland; and where any person who is or has been an agent shall be adduced and examined as a witness for his client, touching any matter or thing, to prove which he could not competently have been adduced and examined according to the existing law and practice of Scotland, it shall not be competent to the party adducing such witness to object, on the ground of confidentiality, to any question proposed to be put to such witness on matter pertinent to the issue.

§ 2. "It shall be competent to adduce and to examine as a witness as aforesaid in any action or proceeding any party to such action or proceeding, even although individually named in the record or proceeding, unless it shall be shown to the satisfaction of the Court, or of the person having authority to take evidence as aforesaid, that such party has a substantial interest in such action or proceeding, and is not merely nominally a party thereto."

In 1853, so much of the 1st section of this Act as renders agents incompetent witnesses, and the whole of the 2nd section, were repealed by 16 & 17 Vict., c. 20, and it was further enacted as follows :—

§ 3. "It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence,

any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an *interest in the matter in question, or in the event of the trial* of any issue, matter, question, or injury,[1] or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been *previously convicted of any crime or offence:*[2] Provided that this Act shall not render

or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland; or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage.

§ 4. "Nothing herein contained shall apply to any action, suit, or proceeding instituted in Scotland in consequence of adultery or for dissolving any marriage, or for breach of promise of marriage, or in any action of declarator of marriage, nullity of marriage, putting to silence, legitimacy, or bastardy, or in any action of adherence or separation.

§ 5. "The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always, that it shall not be competent to any party, who has called and examined the opposite party as a witness, thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland.

§ 6. "Nothing herein contained shall alter or affect the authority or practice of the courts in Scotland as to judicial examination."

[1] *Sic* in the printed statute. Qu. "*inquiry.*"

[2] Independent of this Act, witnesses are competent, though not compellable, to testify to their own turpitude; as for instance, to admit that their former oaths were corruptly false, R. *v.* Teal, 11 East, 309; Rands *v.* Thomas, 5 M. & Sel. 244; or to prove that notes, to which they have given credit and currency by their signatures, have been fraudulently concocted by them. Jordaine *v.* Lashbrooke, 7 T. R. 601, overruling Walton *v.* Shelley, 1 T. R. 296. In fact, the maxim of the civil law, "nemo allegans suam turpitudinem est audiendus," is not recognised in English courts of justice:

competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively; provided also that this Act shall not repeal any provision [in the New Will Act]:[1] Provided that in Courts of Equity any defendant to any cause pending in any such court, may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant, so to be examined, may have in the matters, or in any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant as a witness."

§ 1216. It will be seen that, by the provisoes here introduced, some few exceptions were engrafted on the general rule, that no interested witness should be incompetent to give evidence; and so far the triumph of Mr. Bentham's proposition, that "in the character of objections to competency, no objections ought to be allowed,"[2] failed to be complete. A brighter prospect, however, was soon about to dawn; and in 1846, the Legislature, while establishing the County Courts by the Act of 9 & 10 Vict., c. 95, had the courage to enact, that "on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath or solemn affirmation."[3] After the wisdom of this great alteration in the law

and the decisions of Jefferies, C. J., and Legge, B., who are both reported to have rejected witnesses, when called to prove that they had perjured themselves on some former occasion, are no longer of any authority. See Titus Oates' case, 10 How. St. Tr. 1185, 1186; and Eliz. Canning's case, 19 How. St. Tr. 632.

[1] 7 Will. 4 & 1 Vict., c. 26, §§ 14—17.

[2] 1 Rat. of Judl. Ev. 3.

[3] § 83. See also 6 & 7 Will. 4, c. 75, § 36, and 14 & 15 Vict., c. 57,

had been tested and thoroughly proved by the experience of six years, a final effort was made by Lord Brougham to induce Parliament to carry out the principle to its legitimate extent. This effort was crowned with almost entire success; and the statute 14 & 15 Vict., c. 99, having received the Royal assent in August 1851, came into operation in the following September.[1]

§ 1217. The first four sections of this Act, which relate to the competency of witnesses, are as follows:—

"I. So much of § 1 of the Act of 6 & 7 Vict., c. 85, as provides that the said Act shall 'not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part,' is hereby repealed." [2]

"II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, *except* as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

§ 102, which enabled parties to appeal to the oaths of their opponents in the Irish Civil Bill Courts.

[1] § 20. This statute was prepared by the author of the present work, who originally submitted it to Lord Denman, and after obtaining his sanction to the alterations proposed, intrusted it to Lord Brougham. It was first introduced into the House of Lords in 1849, but it was not pressed forward during that or the following year, in consequence of the threatened opposition of Sir John Jervis, the then Whig Attorney-General.

[2] It will be observed that this section repeals the whole of the first proviso in § 1 of Lord Denman's Act, excepting the words at the end of it, "*or the husband or wife of such persons respectively.*"

"III. But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself,[1] or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

"IV. Nothing herein[2] contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery,[3] or to any action for breach of promise of marriage."[4]

§ 1218. Although at the time when these sections first came

[1] This proviso was most injudiciously introduced into the Act by the House of Lords at the pressing instance of Lord Truro. As Lord Campbell pointed out at the time, it is merely calculated to raise doubts where none should exist. By the general law of the land, *every witness* is protected from answering questions, where the answers would tend either to criminate himself, or to expose him to any penalty, forfeiture or ecclesiastical censure; and as the Act simply makes parties witnesses, it is obvious that, without any special enactment, they might have claimed the same protection as all other persons under examination. But, how stands the matter now? the Act states that they cannot be forced to criminate themselves. Good; but can they be compelled to disclose what will render them liable to penalties, forfeitures, or spiritual reprimands? Is the maxim, "*expressum facit cessare tacitum*," to apply, or can the party give the go-by to the statute, and rest on the common law?

[2] This word ought to have been "hereinbefore;" for as the clause stands at present, the exception is made to extend to the whole Act, and not merely to the first two sections. Practically the mistake is of little importance; as it is difficult to discover any sections in the statute, excepting the first and second, which could apply to either of the proceedings excluded.

[3] See post, §§ 1220 A—1221.

[4] § 5 provides that nothing in the Act shall repeal any provision of the New Will Act. This section, which was copied from Lord Denman's Act, would seem to be unnecessary. It was introduced ex majori cautelâ, in order to preserve intact § 15 of 7 Will. 4 & 1 Vict., c. 26, which enacts, that gifts to the attesting witnesses of wills, or to their husbands or wives, shall be void.

into operation, learned judges might have been found, who, taking a cautious view of the subject, were inclined to regard the examination of parties as a questionable, if not a very dangerous, experiment; it is believed, that, at present, every eminent lawyer in Westminster Hall will most readily admit, that this change in the law has been productive of highly beneficial results. In courts of law, it has not only enabled very many honest persons to establish just claims, which, under the old system of exclusion, could never have been brought to trial with any hope of success; but it has deterred at least an equal number of dishonest men from attempting, on the one hand, to enforce a fraudulent demand; and, on the other, to set up a fictitious defence. The knowledge that a party might tell his own story to the Court and jury, has operated strongly as an encouragement to the suitor who was the witness of truth; while the dread of cross-examination, and consequent exposure, has had a corresponding tendency to check litigation, in cases where a verdict could only be obtained through the medium of perjury. In Courts of Equity the same advantages have arisen, so far as respects the power now first granted to parties of giving testimony in their own favour; while defendants, who, under the former law, would have been forced to file cross bills for the purpose of "scraping the conscience" of plaintiffs, have been enabled to effect that desirable object without having recourse to this dilatory and costly proceeding. The Common Law Commissioners have expressed an opinion most favourable to the merits of the measure; and in their second Report[1] have observed, that "according to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably, and to contribute in an eminent degree to the administration of justice."

§ 1219. On one point, the Act of 1851 was essentially defective; for although it rendered husbands and wives admissible witnesses for or against each other, when both were *jointly parties* as plaintiffs or defendants,[2] it did not further interfere with the common

[1] P. 11.

[2] Stokehill and Wife *v.* Pettingell, 21 L. J., Q. B., 249, note.

law rule, which,—except in the County Courts,[1] the Barmote Courts of Derbyshire,[2] and the Court of Bankruptcy,[3]—precluded either the husband or the wife from giving testimony in a cause in which the other was a party. This defect in the measure, which owed its existence to the unyielding opposition of Lord Chancellor Truro, and the cautious misgivings of Lord Cranworth, was soon found to be productive of much practical injustice; and an attempt was accordingly made to get rid of the difficulty, by putting a forced interpretation upon the language of the statute. The attempt failed, as it deserved to do;[4] and Lord Brougham once more had recourse to the Legislature. The Evidence Amendment Act of 1853[5] was passed with universal consent, and the law which governs the

[1] 9 & 10 Vict., c. 95, § 83, cited ante, § 1216.

[2] 14 & 15 Vict., c. 94, § 18.

[3] 12 & 13 Vict., c. 106, § 118, which enacts, that "it shall be lawful for the Court to summon before it the wife of any bankrupt, and to examine her, after she shall have made and signed the declaration [to speak the truth, see post, § 1257,] either by word of mouth or interrogatories in writing, for the finding out and discovery of the estate, goods, and chattels, of such bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her own act, or by any other person; and she shall incur such danger or penalty for not coming before the Court, or for refusing to be sworn and examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the Court, as is hereinafter provided," in § 260 of the Act.

[4] Stapleton v. Crofts, 18 Q. B. 367; Barbat v. Allen, 7 Ex. R. 609.

[5] 16 & 17 Vict., c. 83. The first four sections of the Act are as follows:—

§ 1. "On the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by deposition according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

§ 2. "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery." See post, §§ 1220 A—1221, and 1237 A.

§ 3. "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be com-

admissibility of the testimony of married persons, has at length been placed on a sound footing. As a general rule, all husbands and wives of parties to the record,—excepting the husbands and wives of defendants in criminal proceedings,[1] and the wives of supposed paramours who are respondents in suits for dissolution of marriage, or for damages by reason of adultery,[2]—are now competent and compellable to testify, but they are still privileged from disclosing any communication made to them during the marriage.[3]

§ 1220. Regard being had to the exceptions specified in the Acts of 1851 and 1853, just cited, and a reference being also made to certain other legal rules, which will presently be mentioned, the law now in force will be found to regard *six classes* of persons as *incompetent* to testify; namely, first,[4] the parties to any action for breach of promise of marriage; secondly,[5] those persons who, in any criminal proceeding, are charged with the commission of any indictable offence, or any offence punishable on summary conviction, so far at least as relates to their giving evidence on oath either for or against themselves; thirdly,[6] the husbands and wives of all persons, who are defendants in any criminal proceeding; fourthly,[7] the wives of supposed paramours who are made respondents in suits for dissolution of marriage, or for damages by reason of adultery; fifthly, in cases of high treason and misprision of treason, other than such as consist in injuring or attempting to injure the Queen's person,[8] those persons who are not included, or properly described, in the list of witnesses

pellable to disclose any communication made to her by her husband during the marriage."

§ 4. "So much of" § 1 of 6 & 7 Vict., c. 85, "as provides that the said Act shall not render competent the husband or wife of any party to any suit, action, or proceeding, individually named in the record, or of any lessor of the plaintiff, or of the tenant of premises sought to be recovered in ejectment, or of the landlord or other person in whose right any defendant in replevin may make cognizance, or of any lessor in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed."

1 Post, § 1227.

2 Post, § 1237 A.

3 Ante, § 830.

4 Post, § 1222.

5 Post, § 1223.

6 Post, § 1227.

7 Post, § 1237 A.

8 See 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, Ir.; 5 & Vict., c. 51, § 1; ante, § 875.

delivered to the defendant pursuant to statute;[1] and, lastly, persons insensible to the obligations of an oath.[2] On the second and third of these general rules a few exceptions have been engrafted, which will be noticed in their proper places.

§ 1220 A. Before discussing the law as it affects these six classes of persons, it will be convenient to refer to a seventh class, whose evidence until recently has been rigidly excluded, but who now occupy such a position that it is almost impossible, in the absence of decisions on the subject, to state with certainty to what extent they are competent or incompetent to testify. Allusion is here made to the parties, and the husbands and wives of parties, in any suit instituted in consequence of adultery. Prior to the establishment of the Court for Divorce and Matrimonial Causes, these persons were incompetent witnesses. The common law rejected their testimony, in common with that of other parties to the record, and of the husbands and wives of parties; and the Legislature, while repudiating the old doctrines of the common law in relation to competency, expressly excepted these particular individuals from the operation of the new laws of evidence.[3] The question then is, whether the common law, thus left untouched by the Evidence Acts of 1851 and 1853, has been annulled either wholly or partially by the statute passed in 1857 for amending the law of divorce. In other words, if a suit be instituted in the new court, either for judicial separation by reason of adultery, or for dissolution of marriage, or for damages against the supposed adulterer,[4] can the parties to such suit be compelled to give evidence on behalf of their opponents, or are they competent to testify in their own favour? If § 48 of the Act is to be strictly construed, these questions must be answered in the negative; for that section enacts, that "the rules of evidence observed in the Superior Courts of Common Law at Westminster, *shall* be applicable to and observed in the trial of *all* questions of fact in the court." But then § 41 enacts, that every person seeking,

[1] 7 Anne, c. 21, § 11; post, § 1238. [2] Post, § 1243.

[3] 14 & 15 Vict., c. 99, § 4, cited ante, § 1217; 16 & 17 Vict., c. 83, § 2, cited ante, p. 1089, n. 5.

[4] See 20 & 21 Vict., c. 85, §§ 7, 16, 27, 33.

among other things, "a decree of judicial separation, or a dissolution of marriage," shall, together with the petition, "file an affidavit verifying the same so far as he or she is able to do so;" while § 43 empowers the Court, "if it shall think fit, to order the attendance of the petitioner, and to examine him or her, or permit him or her to be examined or cross-examined on oath, on the *hearing of any petition;* but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery." § 46 further provides, that parties,—subject to such rules as may be established for the Court,[1]—"shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open court, and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed."

§ 1220 B. It will be seen that these last three sections, if construed as applicable to suits "instituted in consequence of adultery," are entirely opposed to § 48 of the same Act; and this opposition may reasonably justify an argument that they were simply intended to apply either to preliminary and interlocutory proceedings in the cause,[2] as contradistinguished from the actual trial of the question of fact, or to such suits only as are not included in the exceptions of the recent Evidence Acts.[3] It may be urged, that it is the duty of the lawyer, in construing the behests of the lawgiver, to give effect, if possible, to every word; that the Legislature cannot be presumed to have sanctioned two contradictory enactments, *at least* in the *same* Act; and that

[1] This seems to be the meaning of the somewhat doubtful language of the Act, "except as hereinbefore provided." See Reg. 2, cited post, p. 1093, n. 1; and Reg. 15, cited post, p. 1093, n. 2.

[2] On a motion under the old law in an action of crim. con. for a new trial on the ground of surprise, the affidavit of the defendant denying that he had intrigued with the plaintiff's wife, has been received, though the wife's affidavit to the same effect was rejected, Hawker *v.* Seale, 17 Com. B. 525.

[3] 14 & 15 Vict., c. 99, § 4, cited ante, § 1217; 16 & 17 Vict., c. 83, § 2, cited ante, p. 1089, n. 5.

the only rational mode of reconciling these apparently irreconcilable clauses, is, by putting upon them one or other of the constructions stated above. Still, as this reasoning may possibly not be judicially adopted,[1] it is desirable to consider briefly what, under such circumstances, will be the position of the respective parties to suits instituted in the new court, with respect to their rights and liabilities as witnesses. And here it may be laid down with tolerable certainty, that in all suits of nullity of marriage, whether founded on impotence or on prior nuptials; in all suits for judicial separation by reason of cruelty or desertion; in all suits for jactitation of marriage, or for restitution of conjugal rights, the respective husbands and wives, whether de jure or de facto, are competent and compellable, as parties to the suit, to be examined as witnesses on either side. In these cases, the only difference between the old and the new law seems to be, that, in addition to the right of being orally examined in chief,—which right, it is presumed, remains intact,—the plaintiffs must verify their petitions,[2] and the defendants, unless they simply deny the facts stated by their opponents, must verify their answers[3] by affidavit; the respective deponents being liable, either on the application of the opposite party,[4] or by direction of the Court, to an oral cross-examination, and being, in that event, entitled to an oral re-examination.[5]

§ 1221. In suits for judicial separation by reason of adultery,

[1] In Deane *v.* Deane, which was a petition by wife against husband for judicial separation by reason of adultery, the reasoning in the text *was* adopted by Sir C. Cresswell, but the question was not formally argued. This case was heard in Ct. of Prob. on 19th March, 1858., MS.

[2] Reg. 2 of Rules for Ct. for Prob. and Mat. Caus. directs, that "every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition, of which he or she has personal cognisance, and such affidavit shall be filed with the petition."

[3] Reg. 15 of Rules for Ct. for Div. and Mat. Caus. directs, that "every answer, which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent, verifying such other, or additional matter, and such affidavit shall be filed with the answer."

[4] These applications must "be made on summons to the judge ordinary sitting in Chambers;" Reg. 38 of Rules for Ct. for Div. and Mat. Caus.

[5] 20 & 21 Vict., c. 85, § 46.

for dissolution of marriage, and for damages against the supposed adulterer,[1] the alteration in the law effected by the recent Act will, —if the parties be held admissible witnesses at all,—be much greater; for, although such parties will still be incompetent to testify orally in their own behalf, at least in the first instance, they will be bound to support their respective cases by affidavits made by themselves.[2] They thus, in common with all other deponents, will become subject to oral cross-examination;[3] and, unless they be petitioners examined under the order of the Court,[4] they would seem to be bound to answer questions even tending to show that they have been guilty of adultery. Whether this be a desirable state of the law, especially where the supposed paramour is one of the defendants, and where, under the hypothesis of his guilt, he must be exposed to an almost irresistible temptation to commit perjury,[5]—is a matter deserving serious consideration; and what renders such a law doubly objectionable is, that it does not apply equally to both parties in the suit. Take, for example, a petition for dissolution of marriage, in which suit the wife and the supposed paramour are respondents. The petitioner files an affidavit verifying the facts stated in the petition. The respondents severally deny the facts alleged, and set up a counter charge of adultery on the part of the petitioner, supporting the answers by affidavits.

[1] 20 & 21 Vict., c. 85, §§ 7, 16, 27, 33.

[2] Id. §§ 41, 46; Reg. 2 and 15 of Rules for Ct. for Div. and Mat. Caus.

[3] 20 & 21 Vict., c. 85, § 46.

[4] Id. § 43.

[5] This subject was finely dealt with by Mr. Denman on the Queen's trial. "We have been told," said he, "that Bergami might be produced as a witness in our exculpation, but we knew this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. * * * How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuists might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths." Quoted in 1 Lord Brougham's Speech. 248.

The questions of fact come on for trial before a jury. The petitioner attends by order of the Court, and is permitted to be examined on oath. In cross-examination, he is asked some question respecting his own intrigues, but he declines to answer, and the Court protects him. His wife and the supposed paramour are next cross-examined under § 46 of the Act, with the view of establishing their mutual guilt. They apply for protection to the Court, but they apply in vain. The law which screens the husband has no power to shield the wife. Surely this is a result which was never contemplated by the framers of the measure; but it is one, which, if the parties be made witnesses, must follow from the language employed.

§ 1222. Returning now to the doctrine of competency, as recognised in the ordinary Courts of Common Law, the *first class* of persons whose testimony is rejected, comprises the parties to any action for breach of promise of marriage. These particular actions being expressly excepted out of the operation of Lord Brougham's Act,[1] are still governed by the old law, though it is probable that this will be only a temporary inconvenience. The expediency of excluding the testimony of parties in breaches of promise of marriage,[2] is, to say the least of it, extremely problematical; for most persons who have watched the working of the new law must have come to the conclusion, that actions of this nature are precisely those in which juries ought to have the advantage of seeing the litigants, and of hearing what they have to say on either side.

§ 1223. The *second class* of persons whom the law in general regards as partially incompetent to testify, includes defendants in our criminal courts, and parties charged before magistrates with minor offences. It has been seen that Lord Brougham's Act of 1851, in making parties to the record admissible witnesses, has expressly provided in § 3,[3] that nothing in the Act "shall render any person, who in any criminal proceeding is charged with the commission of any *indictable* offence, or any offence *punishable on*

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[1] 14 & 15 Vict., c. 99, § 4, cited ante, § 1217.

[2] This exception was introduced into the Bill in its passage through the Lords.

[3] Ante, § 1217.

summary conviction, competent or compellable to give evidence for or against himself or herself." Now, this proviso calls for three observations. In the first place, it does not say that the persons specified in it shall not be rendered by the Act competent or compellable to give evidence *at all*, but merely that they shall not be allowed or forced to testify *for or against themselves*. If, therefore, several persons be jointly indicted, any one of them may, under § 2, be called as a witness either for or against his co-defendants,[1] excepting only in those few cases, where the indictment is so framed as to give him a direct interest in obtaining their discharge. For instance, if a man were indicted for a conspiracy[2] or a riot[3] with other defendants, or as an accessory to their guilt, or for unlawfully entering land with them by night, being armed for the purpose of taking game,[4] or for assembling with them, whether armed or not, to assist in the illegal landing of goods,[5] it would seem that he could not be a competent witness for them, or compellable to give evidence against them; because, in each of these cases—and several others of a similar kind might be cited—as the crime can only be effected by the guilty concurrence of two or more individuals, the acquittal of the other defendants would inevitably lead to his own, while their conviction might at least be a material step in

[1] R. *v.* Stevenson and Coulter, tried before Ball, J., at Armagh, on 4th of March, 1851. The indictment was for an aggravated assault, and Coulter was examined as a witness for Stevenson. MS. But see R. *v.* Jackson, 6 Cox, C. C. 525, where, however, no reference was made to Ld. Brougham's Act, or to the case cited above.

[2] To constitute the crime of conspiracy *two* persons at least must be engaged in it; 1 Hawk. P. C. c. 72, § 8. See R. *v.* Thompson, 16 Q. B. 832.

[3] A riot can only be committed by *three* persons or more; 1 Russ. C. & M. 266; and the same number of persons is required to constitute the offence of seamen riotously assembling, and forcibly obstructing the loading, unloading, sailing, or navigating of any vessel. See 33 Geo. 3, c. 67, § 1. The refusing to disperse after proclamation is felony, only when *twelve* or more persons are unlawfully assembled. See 1 Geo. 1, st. 2, c. 5, § 1.

[4] Under 9 Geo. 4, c. 69, § 9. Here, *three* or more persons must be together. See R. *v.* Whittaker, 1 Den. 310. See also 1 & 2 Will. 4, c. 32, §§ 30, 32.

[5] Under 16 & 17 Vict., c. 107, §§ 247, 248. Here, also, three or more persons must have assembled. To render the offence of being found with goods liable to forfeiture a felony, six persons must be in company, except under special circumstances of aggravation. See § 250 of the Act.

establishing his guilt. Whenever, therefore, it becomes necessary, under the circumstances just stated, to obtain the testimony of a defendant in a criminal trial as against his co-defendants, the proper course is either to enter a nolle prosequi,[1] or to apply for a verdict of acquittal before opening the case;[2] though the Court, in its discretion, will direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculpating the party who is sought to be made a witness.[3] As soon as a prisoner has thus been acquitted he becomes competent to testify either for the Crown, or for his former co-defendants.[4]

§ 1224. The second point which it is important to notice with respect to the proviso in question is, that it merely applies to persons who are charged in any *criminal* proceeding either with *indictable* offences or with offences punishable by *summary conviction*. Penal proceedings instituted in the Ecclesiastical Courts do not fall within either of these two categories; and, consequently, if the office of the judge be promoted against a clergyman for immoral conduct, the defendant will be competent to testify in his own behalf, and may even be subjected to examination on the part of the prosecution. It may be true that he cannot be compelled to answer any questions tending to expose him to conviction, though this is a point on which, as before observed,[5] some doubt may possibly be entertained; but should he rely on his legal protection and decline to answer, the inference against him raised by such conduct must of necessity be strong.[6] It is equally obvious that qui tam actions for penalties, —although to a certain extent they partake of a penal character, —are not included in the language of the proviso; and the defendants in such actions may therefore be examined on either side. The same remark applies to many charges preferred before

[1] R. v. Sherman, Cas. temp. Hardw. 303; R. v. Ellis, 1 M'Nally Ev. 55.
[2] R. v. Rowland, Ry. & M. 401, per Abbott, C. J.
[3] R. v. Fraser, 1 M'Nally Ev. 56; R. v. O'Donnell, 7 Cox, C. C. 337.
[4] R. v. O'Donnell, 7 Cox, C. C. 341, 342, per Monahan, C. J.
[5] See ante, p. 1087, n. 1.
[6] Att.-Gen. v. Radloff, 10 Ex. R. 98, per Martin, B.; 107, per Parke, B.

justices, which, although in one sense they may be regarded as criminal proceedings, do not result in summary convictions. Among these may be mentioned applications for orders of affiliation; and it is certainly not the least important benefit conferred by the Act, that men have now an opportunity afforded them of defeating the false accusations of unscrupulous and designing women.[1]

§ 1225. As serious doubts have been entertained, whether an information filed by the Attorney-General in the Court of Exchequer for the recovery of penalties consequent on a breach of the revenue laws, was such a "criminal proceeding" as to render the defendant an inadmissible witness,[2] the Legislature has thrice interposed with the view of clearing up the matter by positive enactment. The first two attempts,[3]—which extended to all prosecutions, suits, and proceedings under the laws relating to the customs or inland revenue,—failed from want of competent skill in the draughtsman.[4] The third has only partially succeeded; —for although it is now enacted, in not very grammatical phraseology, that "the several Acts which declare and make competent and compellable a defendant to give evidence in any suit or proceeding to which he may be a party, shall not be deemed to extend or apply to defendants in any suit or proceeding instituted under any Act relating to the customs,"[5]—no notice is taken of parties who are sued for infringing the Excise laws. The question therefore with respect to these offenders is still open for discussion.

§ 1226. The third observation suggested by the proviso in question is, that it does not render the persons specified incompetent to testify either for or against themselves,—for the Act is in no respect a *disqualifying* statute,—but it simply leaves

[1] See ante, § 881.

[2] Att.-Gen. v. Radloff, 10 Ex. R. 84. Pollock, C. B., and Parke, B., held that the defendant was not a competent witness; Platt and Martin, Bs., held that he was.

[3] 17 & 18 Vict., c. 122, § 15; 18 & 19 Vict., c. 96, § 36.

[4] See § 1225 of 2nd edition of this work.

[5] 20 & 21 Vict., c. 62, § 14.

untouched the previous law on the subject. In whatever cases therefore, previous to the passing of the Act, defendants charged with offences were rendered competent to give evidence, they may still, notwithstanding the proviso, be examined as witnesses. The principal statutes which authorise such an examination, will be found to relate to cases in which the defendant is either a nominal party on the record, or is only one of many persons against whom the proceeding is really instituted. For example, if a parish be indicted for non-repair of a road, the inhabitants, though defendants, are rendered admissible witnesses by virtue of the Highway Act of 1835;[1] and under the Act of 3 & 4 Vict., c. 26,[2] the inhabitants of a township will in like manner be *competent*, though they cannot be *forced*, to testify, if an indictment be preferred against the township for non-repair of a bridge.[3]

§ 1227. The *third general rule of exclusion*, subject to some exceptions which will be presently mentioned,[4] precludes husbands and wives from giving testimony for or against each other in any criminal proceeding. This is the common law rule, which has not been interfered with either by the Act of 1851, or by the Act of 1853. Both statutes contain an express proviso, that nothing therein shall "render any husband competent or compellable to give evidence for or against his wife, or any wife competent or

[1] 5 & 6 Will. 4, c. 50, § 100.

[2] § 1 enacts, that "no person called as a witness on *any trial* in any *Court whatever*, may and shall be prevented or disabled from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed, or liable to be rated or assessed, to the relief of the poor, or for or towards the maintenance of church, chapel, or highways, or for any other purpose whatever." § 2 enacts, that "no churchwarden, overseer, or other officer, in or for any parish, township, or union, or any person rated or assessed, or liable to be rated or assessed as aforesaid, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding, by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a *nominal* party to such trial, appeal, or other proceeding, and shall be only liable to contribute to such costs in common with other the ratepayers of such parish, township, or union."

[3] R. v. Adderbury East, 5 Q. B. 187.

[4] Post, §§ 1236, 1237.

compellable to give evidence for or against her husband, in any criminal proceeding."[1] The object of the proviso in the first-named Act has been much misunderstood by the judges.[2] Mr. Baron Parke observes, with characteristic caution, that the clause was introduced "perhaps unnecessarily." Mr. Baron Martin, more bold, treats it as an obvious error; while Sir Frederick Pollock and Mr. Justice Crompton are willing to consider that "it was inserted ex majori cautelâ." Thus far the judges; but, in point of fact, there was no error or needless caution in the matter. As the bill originally stood, the clause was obviously necessary, because husbands and wives were made competent witnesses. The enactment, however, to that effect, after having been struck out in the Upper House and reinserted by the Commons, met with so strenuous an opposition when the bill was returned to the Lords, that it was withdrawn at the last moment. The Act, therefore, finally passed in a form which left the law of husband and wife precisely where it found it,—excepting only in those few cases where both of them are either parties to the record, or persons in whose behalf the action is brought or defended. Whenever this state of things occurs, the wife, as a party, or an interested person, may, under the express terms of the second section, give evidence for or against her husband, and the husband, in like manner, may give evidence for or against his wife; and it was merely because a man and his wife are sometimes both of them *parties* to the same indictment or other criminal proceeding, that the clause prohibiting them, under such circumstances, from testifying for or against each other was *retained* in the Act, although the general enactment respecting husbands and wives was struck out. Were it not for this clause, a wife, conjointly indicted with her husband for murder, might be called by the prosecutor to establish the man's guilt, or the man might be examined by the counsel for the defence to prove the woman's innocence.

§ 1228. Returning now to the rule itself, it will be found not

[1] 14 & 15 Vict., c. 99, § 3; 16 & 17 Vict., c. 83, § 2.

[2] See Barbat *v.* Allen, 7 Ex. R. 615, 616; Stapleton *v.* Crofts, 18 Q. B. 367; Kernot *v.* Pittis, 2 E. & B. 425.

only to exclude the husband or wife of a defendant in a criminal proceeding, who is called to give evidence of what occurred during their marriage, but to prevent such witness from being examined, either as to circumstances that happened *before* the marriage, or even as to the very *fact* of the *marriage* itself. Thus, if a man be prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant.[1] The rule also applies to all cases in which the interests of a married person, who is a defendant in a criminal proceeding, are involved, and therefore a wife cannot be witness for a *co-defendant*, if her testimony, as in the case of a conspiracy, would tend directly to her husband's acquittal.[2] This doctrine has been carried to such a length, that where the wife of one prisoner was called to prove an alibi in favour of another jointly indicted with her husband for burglary, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution who had identified both prisoners, it would materially weaken the case against the husband.[3]

§ 1229. Moreover, as the courts recognise no distinction between admitting the evidence of married persons for or against each other,[4] a husband has been deemed an inadmissible witness in support of a prosecution, which charged his wife and several other persons with conspiring to procure his marriage without the consent of his parents;[5] and where four men were indicted for sheep stealing, Mr. Baron Bolland rejected the testimony of the wife of one of them, who was called to prove facts against the other prisoners.[6] It seems highly questionable, however, whether this last decision does not outstep the bounds of law.

§ 1230. But though the rule of exclusion is thus stringent where a married person is criminally accused in conjunction with

[1] Grigg's case, T. Raym. 1; 1 Hale, 693.; 1 Russ. C. & M. 218.

[2] R. *v.* Locker, 5 Esp. 107, per Lord Ellenborough.

[3] R. *v.* Smith, 1 Moo. C. C. 289. See also R. *v.* Hood, id. 281; R. *v.* Frederick, 2 Str. 1095; R. *v.* Glassie, 7 Cox, C. C. 1.

[4] R. *v.* Perry, per Gibbs, C. J., cited and approved of by Abbott, C. J., in R. *v.* Serjeant, Ry. & M. 354.

[5] R. *v.* Serjeant, Ry. & M. 352.

[6] R. *v.* Webb, 2 Russ. C. & M. 982. See 1 Hale, 301.

others, it is clear that where a married defendant is entirely removed from the record, whether by a verdict pronounced in his favour, or by a previous conviction, or by the jury not being charged with his interest at the time of the trial, his wife may testify either for or against any other persons who may be parties to the record;[1] and the mere hope that, by giving evidence against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime, will by no means affect her competency, though it may and indeed must shake her credit.[2] It seems scarcely necessary to add, that the wife of a prosecutor in a criminal proceeding would not be excluded by this rule from giving evidence either for the Crown or for the defendant.[3]

§ 1231.[4] This rule of exclusion is extended only to *lawful marriages*, or at least to such as are innocent in the eye of the law. Thus, upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness either for or against the prisoner; for the second marriage is void.[5] But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted.[6] Whether a man can call as a witness a woman with whom he has long cohabited, whom he has constantly *represented to be his wife*, and by whom he has had children, has been declared to be at least doubtful.[7] Lord Kenyon rejected such a witness when offered by the prisoner, in

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[1] Hawkesworth *v.* Showler, 12 M. & W. 49, 50, per Alderson, B.; R. *v.* Williams, 8 C. & P. 284, per id., who stated that, in Thurtell's case, Mrs. Probert was examined as the principal witness against Thurtell, after her husband was acquitted. [2] R. *v.* Rudd, 1 Lea. C. C. 127.

[3] See R. *v.* Houlton, 1 Jebb, C. C. 24.

[4] Gr. Ev., § 339, in part.

[5] B. N. P. 287; R. *v.* Serjeant, Ry. & M. 354, per Abbott, C. J.

[6] Grigg's case, T. Raym. 1. But it seems, that the wife, though inadmissible as a witness, may be *produced* in court for the purpose of being *identified*, although the proof thus furnished may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note, which he is charged with having stolen. Alison's Pr. 463.

[7] Campbell *v.* Twemlow, 1 Price, 88, 89, per Thompson, C. B.

a capital case tried before him at Chester;[1] but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of Batthews *v.* Galindo,[2] where Lord Kenyon's ruling was discussed, Park and Burrough, Js., declared that his lordship's decision was founded on this admission, and the whole Court determined that a kept mistress was a competent witness for her protector, though she passed by his name, and appeared to the world as his wife. So, where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.[3] It seems also, from this last case, and from several others,[4] that a supposed husband or wife may be examined on the voir dire to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony.[5]

§ 1232.[6] Whether the rule may be relaxed so as to admit the wife to testify for or against the husband, where the parties *consent* to such a course, is a question on which the authorities are not agreed.[7] Lord Hardwicke was of opinion that she was not admis-

[1] Anon., cited by Richards, B., in 1 Price, 83.

[2] 4 Bing. 610, 612, 613; 3 C. & P. 238, and 1 M. & Pay. 565, S. C.

[3] Wells *v.* Fletcher, 5 C. & P. 12, per Patteson, J.; S. C., nom. Wells *v.* Fisher, 1 M. & Rob. 99, and n.

[4] R. *v.* Peat, 2 Lew. C. C. 288; R. *v.* Wakefield, id. 279; 1 Russ. C. & M. 218, n. *t.*

[5] R. *v.* Bramley, 6 T. R. 330; R. *v.* Bathwick, 2 B. & Ad. 646, where Lord Tenterden observed, that "it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called."

[6] Gr. Ev., § 340, in great part.

[7] Under § 1710, clause 1, of the New York Code of Civ. Proc., "A husband cannot be examined, for or against his wife, without her consent,

sible to give evidence against her husband even with his consent;[1] and this opinion has been followed in America,[2] apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, but that the public have also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. Still, Lord Chief Justice Best stated on one occasion,[3] that he would receive the evidence of the wife if her husband consented; apparently regarding the interest of the husband as the sole ground of her exclusion, since he cited a case where Sir James Mansfield[4] had once permitted a plaintiff to be examined with his own consent. This question was afterwards again mooted in the Court of Exchequer, in a case in which the defendant had called his wife as a witness, but the judge at Nisi Prius had rejected her testimony on objection taken.[5] The plaintiff had afterwards offered to waive the objection, but the judge had refused to receive the waiver. Under these circumstances, the learned Barons, without deciding the question whether the witness could be thus examined by consent, were contented to hold that it was at least discretionary with the judge, whether he would allow the objection to be withdrawn, and he having refused to do so, they declined to interfere.[6]

§ 1233.[7] Although, in the instances before mentioned, the hus-

nor a wife, for or against her husband, without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding, by one against the other, nor to a criminal action or proceeding, for a crime committed by one against the other."

[1] Barker v. Dixie, Cas. temp. Hardw. 264.

[2] Randall's case, 5 City Hall Rec. 141, 153, 154; Colbern's case, 1 Wheeler's C. C. 479.

[3] Pedley v. Wellesley, 3 C. & P. 558.

[4] In the report, the decision is said to have been one of Lord Mansfield's, but this is probably a mistake, as the case referred to would seem to be that of Norden v. Williamson, 1 Taunt. 377.

[5] This was before the passing of the Act 16 & 17 Vict., c. 83. See ante, § 1219.

[6] Barbat v. Allen, 7 Ex. R. 609.

[7] Gr. Ev., § 342, in part.

band and wife are inadmissible as witnesses for or against each other, in all other cases they may be called, notwithstanding the evidence of the one may *tend* to subject the other to a *criminal charge*. Thus, in a question respecting a female pauper's settlement, where a man testified that he was married to the pauper, another woman was admitted to prove her own previous marriage with the same man; for although, if the testimony of both witnesses was true, the husband was chargeable with the crime of bigamy, neither the evidence nor the record in that case would be receivable against him upon such a charge, the point at issue being res inter alios acta, and neither the husband nor the wife having any interest in the decision.[1] So, in an action by the indorsee against the acceptor of a bill of exchange, the wife of the drawer would probably be permitted to prove that her husband had forged the bill;[2] though subsequently to the decision of R. *v.* Bathwick, two learned judges are reported to have held, that, on an indictment for theft, a woman could not be called on the part of the Crown, to prove that her husband, who had absconded, was present when the property was taken, and that she saw him deliver it to the prisoner.[3]

§ 1234. But although in these cases, the wife will be *permitted* to testify against her husband, it by no means follows that she will be *compelled* to do so; and the better opinion is that she may throw herself upon the protection of the Court, and decline to answer any question, which would tend to expose her husband to a criminal charge.[4]

§ 1235. In all actions, suits, and other proceedings between

[1] R. *v.* Bathwick, 2 B. & Ad. 639, 647; R. *v.* All Saints, Worcester, 6 M. & Sel. 194. These cases overrule R. *v.* Cliviger, 2 T. R. 263, where it was broadly held, that a wife was in every case incompetent to give evidence, *tending* to criminate her husband.

[2] Henman *v.* Dickinson, 5 Bing. 183; 2 M. & P. 282, S. C. In this case the point was not expressly decided.

[3] R. *v.* Gleed, 2 Russ. C. & M. 983, per Taunton and Littledale, Js. Sed qu.

[4] R. *v.* All Saints, Worcester, 6 M. & Sel. 200, per Bayley, J.; Cartwright *v.* Green, 8 Ves. 405; post, § 1308.

third parties, husbands and wives will be permitted to *contradict*, and even to *discredit*, each other as freely as if the marriage was void.[1] If this were not the law, great injustice might be done; since the competency of the witness would then depend upon the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance of his wife having been previously called on the part of the plaintiff, though, had the defendant been entitled to begin, the husband would have been examined, and the wife rejected. In Ireland all the judges have held, that the evidence of a wife could not be rejected on the ground that she was brought to contradict the testimony of her husband, even where he was the prosecutor of an indictment.[2]

§ 1236.[3] On the rule which precludes husbands and wives from giving testimony for or against each other in criminal proceedings, a necessary exception has been engrafted at common law, when a crime has been committed by the one against the other. Were it not for this exception, the wife would be exposed without remedy to personal injury.[4] If, therefore, a man be indicted for the forcible abduction of a woman with intent to marry her,[5] she is clearly a competent witness against him, if the force were continuing against her till the marriage. Of this last fact also she is a competent witness; and the better opinion seems to be, that she is still competent, notwithstanding her subsequent assent to the marriage, and her voluntary cohabitation; for otherwise, the offender would take advantage of his own wrong.[6] So, in Ireland, on an indictment for the *fraudulent* abduction of an heiress under

[1] Stapleton *v.* Crofts, 18 Q. B. 368, per Lord Campbell; 373, per Erle, J.; 2 B. & Ad. 646, per Lord Tenterden; 6 M. & Sel. 198, per Lord Ellenborough; Annesley *v.* E. of Anglesea, 17 How. St. Tr. 1276.

[2] R. *v.* Houlton, 1 Jebb, C. C. 24.

[3] Gr. Ev., § 343, in part.

[4] See Bentley *v.* Cooke, 3 Doug. 424.

[5] Under 9 Geo. 4, c. 31, § 19.

[6] R. *v.* Wakefield, trial published by Murray; 2 Lew. C. C. 279, S. C. 1 East, P. C. 454; Brown's case, 1 Ventr. 243; 1 Russ. C. & M. 709; 2 id. 984; Perry's case, cited in R. *v.* Serjeant, Ry. & M. 352; 1 Hawk P. C., c. 41, § 13; 1 Bl. Com. 443; M'Nally Ev. 179, 180; 3 Chitty's Cr. L. 817, n. *y*.

eighteen years of age,[1] the lady was admitted as a witness for the prosecution.[2] So, a wife may testify against her husband on an indictment for assisting at a rape committed on her person;[3] or, for an assault and battery upon her;[4] or, for maliciously shooting[5] or attempting to poison[6] her; or, it seems, for any other offence against her liberty or person.[7] She may also exhibit articles of the peace against him, in which case her affidavit shall not be allowed to be controlled and overthrown by his own.[8] Indeed, Mr. East considers it to be settled, that, "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."[9] But though competent as a witness, it is not indispensable that such party should be called;[10] and Mr. Justice Holroyd seems to have thought that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness.[11] It may be doubted, whether this be not restricting the rule within too narrow bounds.

§ 1237.[12] In cases of *high treason*, the question, whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on

[1] Under 10 Geo. 4, c. 34, § 23. See 9 Geo. 4, c. 31, § 20.

[2] R. *v.* Yore, 1 Jebb & Symes, 563.

[3] Lord Audley's case, 3 How. St. Tr. 402, 413; Hutton, 115, 116; B. N. P. 287; R. *v.* Jellyman, 8 C. & P. 604.

[4] B. N. P. 287; R. *v.* Azire, 1 Stra. 633; Soule's case, 5 Greenl. 407.

[5] R. *v.* Whitehouse, cited 2 Russ. C. & M. 984.

[6] R. *v.* Jagger, cited 2 Russ. C. & M. 984.

[7] Per Hullock, B., in R. *v.* Wakefield, trial by Murray, 257.

[8] R. *v.* Doherty, 13 East, 171; Lord Vane's case, id. n. *a.*; 2 Stra. 1202; R. *v.* E. Ferrers, 1 Burr. 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation; Lady Lawley's case, B. N. P. 287; or, in a habeas corpus sued out by him, for the same object, R. *v.* Mead, 1 Burr. 542.

[9] 1 East's P. C. 455; The People ex rel. Ordronaux *v.* Chegaray, 18 Wend. 642. Qu. whether the wife will be an admissible witness against the husband, if he be proceeded against, under 5 Geo. 4, c. 83, § 3, as an idle and disorderly person for deserting her and causing her to become chargeable to the parish.

[10] R. *v.* Pearce, 9 C. & P. 668.

[11] In R. *v.* Whitehouse, cited 2 Russ. C. & M. 984.

[12] Gr. Ev., § 345, in great part.

both sides. The affirmative of the question is maintained,[1] on the ground of the extreme necessity of the case, and the nature of the offence, tending, as it does, to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. But, on the other hand, it is argued, that these political reasons are not sufficient to support an exception to a rule of general utility, and that, as the wife is not bound to discover her husband's treason,[2] by parity of reason, she is not compellable to testify against him.[3] The latter is perhaps the better opinion.

§ 1237 A. The wives of persons who have been made respondents as supposed paramours in suits for dissolution of marriage, or for damages by reason of adultery,[4] constitute the *fourth class* of witnesses, who are incompetent to testify either for or against their husbands. The extreme improbability of any woman thus unfortunately circumstanced being required to give evidence, renders needless any comment on this rule, further than to state, that it rests on the old doctrines of the common law, which rejected the testimony of the husbands and wives of all parties to the record, and which, so far as they related to suits instituted in consequence of adultery, were left untouched by the Evidence Amendment Act of 1853.[5] Moreover, the rule under discussion does not seem to have been modified in any way by the Act to amend the law relating to Divorces and Matrimonial Causes.[6]

§ 1238. The *fifth class* of persons incompetent to testify includes witnesses, who, being called for the Crown in cases of *high treason* or misprision of treason, have not been included or properly described in a *list* duly delivered to the defendant. This head of incompetency rests on an Act passed in the

[1] B. N. P. 286; 1 Gilb. Ev. by Lofft, 252; Grigg's case, T. Raym. 1.
[2] 1 Brownl. 47.
[3] 1 Hale's P. C. 301; 2 Hawk. P. C., c. 46, § 82; Bac. Abr. tit. Ev. A. 1; 1 Chitty's Cr. L. 595; M'Nally Ev. 181.
[4] 20 & 21 Vict., c. 85, §§ 28, 33.
[5] 16 & 17 Vict., c. 83, § 2, cited ante, p. 1089, n. 5.
[6] 20 & 21 Vict., c. 85.

seventh year of Queen Anne, which enacts,[1] that, "when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses." It must be noted, that these words do not extend to treasons, which consist in compassing the assassination, wounding, or injuring the person of the Sovereign, or to the misprisions of such treasons; because parties accused of such grievous offences are, by statute, rendered liable to be dealt with as if they stood charged with murder.[2] Moreover, though, in strict law, the list of witnesses should be delivered *simultaneously* with the jury list and the copy of the indictment, and that, too, ten days at least before the arraignment, (for the word "trial" must, since the Jury Act, bear this interpretation,[3]) and in the presence of two or more credible witnesses;—yet any objection founded on the non-compliance with these regulations must be taken before the jury are sworn, and can only have the effect of postponing the trial.[4] If, however, instead of raising any objection which goes to the array of witnesses, the defendant simply objects that some particular witness is incompetent, as not being included in the list, or as being misdescribed therein, this point, like any other question of competency, may be taken upon the voir dire when the witness is called, and if it prevails, he cannot be examined.[5]

[1] 7 Anne, c. 21, § 11; extended to Ireland by 17 & 18 Vict., c. 26. This last Act was passed in consequence of the decision of the House of Lords in O'Brien *v.* R., 2 H. of L. Cas. 465.

[2] 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, Ir.; 5 & 6 Vict., c. 51, § 1; ante, § 875.

[3] 6 Geo. 4, c. 59, § 21; R. *v.* Lord Geo. Gordon, 21 How. St. Tr. 648.

[4] R. *v.* Frost, 9 C. & P. 162—187; 2 Moo. C. C. 140, S. C.; O'Brien *v.* R., 2 H. of L. Cas. 465.

[5] R. *v.* Frost, 9 C. & P. 183.

§ 1239. The Act, as we have seen, requires that the name, place of abode, and profession, of each witness should be stated in the list, the object of this regulation being, that the defendant should be enabled before the trial to make all due inquiry respecting the characters of the persons who are about to testify against him. It is not, however, necessary that the list should specify the particular house or street where the witness resides, but it will suffice if it describes him as living in a certain town or parish.[1] So, if the witness has two or more residences, the list need only specify one; but if it aim at further particularity, and any one of the places of abode be misdescribed, this inaccuracy will vitiate the whole description.[2] If the witness has recently changed his place of abode, the prisoner must be furnished with a description of his last residence, and it will not be sufficient to describe him as *lately* abiding at the former place.[3]

§ 1240. The judges at Nisi Prius were at one time inclined to regard as *incompetent to testify* all persons, whether *counsel, attorneys,* or *parties,* who, being engaged in a cause, had actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence.[4] Further investigation of the subject, however, has led to a judicial acknowledgment that no such rule of practice exists;[5] although the obvious inconvenience of permitting one and the same person first to state the case as an advocate, and next, to prove that statement as a witness, appears to furnish ample justification for its immediate adoption.[6] With respect to private prosecutors, it may be observed, that as they have no right to address the jury, even though they waive their title to give evidence on oath, they will not be permitted under any circumstances to act in the twofold capacity of advocates and witnesses.[7]

[1] R. *v.* Frost, 9 C. & P. 147, 148. [2] Id. 151—153.

[3] R. *v.* Watson, 2 Stark. R. 116, 128; 32 How. St. Tr. 69—73, S. C.

[4] Stones *v.* Byron, 4 Dowl. & L. 393, per Patteson, J.; Deane *v.* Packwood, id. 395, n. *b*, per Erle, J. See Best Ev. § 168.

[5] Cobbett *v.* Hudson, 22 L. J., Q. B., 11; 1 E. & B. 11, S. C. [6] Id.

[7] R. *v.* Brice, 2 B. & A. 606; R. *v.* Milne, cited id. note *a*; Cobbett *v.* Hudson, 22 L. J., Q. B., 13, per Lord Campbell; 1 E. & B. 13, S. C.

§ 1241. In regard to the *proper time of taking the objection* to the competency of a witness, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the examination in chief. Indeed it has frequently been said by judges, and sometimes so held, that a party who is aware of the existence of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony.[1] However, this doctrine has been disputed by the Court of Exchequer,[2] who have held, in conformity with some old decisions,[3] that the objection may be raised *at any time during the trial,* and that, too, whether the objector previously knew of the disqualification or not. The rule on this subject is the same in equity as at law,[4] and in criminal as in civil cases;[5] but perhaps in trials for high treason, the old doctrine would still be recognised, that if the prisoner intends to object to a witness as being omitted from, or misdescribed in, the list furnished to him, he must do so before the witness is sworn in chief.[6] In ordinary cases, if the objection to the competency

[1] Dewdney *v.* Palmer, 4 M. & W. 664; 7 Dowl. 177, S. C.; R. *v.* Watson, 2 Stark. R. 158; 32 How. St. Tr. 496, 497, S. C.; R. *v.* Frost, 9 C. & P. 183; Beeching *v.* Gower, Holt, N. P. R. 314, per Gibbs, C. J.; Howell *v.* Lock, 2 Camp. 14; Donelson *v.* Taylor, 8 Pick. 390, 392. In Yardley *v.* Arnold, 10 M. & W. 145, Parke, B. observed, "I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the voir dire; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto." See also Hartshorne *v.* Watson, 5 Bing. N. C. 477; 7 Scott, 494, S. C.; and Wollaston *v.* Hakewill, 3 M. & Gr. 297; 3 Scott, N. R. 593, S. C.; Flagg *v.* Mann, 2 Sumn. 487.

[2] Jacobs *v.* Layborn, 11 M. & W. 685.

[3] Needham *v.* Smith, 2 Vern. 463; Lord Lovat's case, 18 How. St. Tr. 596. See also Stone *v.* Blackburn, 1 Esp. 37; Yardley *v.* Arnold, C. & Marsh. 437, 438, per Parke, B.

[4] Needham *v.* Smith, 2 Vern. 463; Vaughan *v.* Worrall, 2 Madd. 322; 2 Swanst. 400, S. C.; Selway *v.* Chappell, 12 Sim. 113; Swift *v.* Dean, 6 Johns. 523, 538; Gresley Ev. 234—236. See Bousfield *v.* Mould, 1 De Gex & Sm. 347.

[5] Lord Lovat's case, 18 How. St. Tr. 596; Com. *v.* Green, 17 Mass. 538.

[6] R. *v.* Watson, 2 Stark. R. 158; 32 How. St. Tr. 496, 497, S. C.; R. *v.* Frost, 9 C. & P. 183.

of a witness be not taken until *after the trial*, it will be considered as coming too late; and the Courts will not grant a new trial for this cause alone,[1] unless the incompetency were known and concealed by the party producing the witness,[2] or other evidence can be given of mala praxis on his part.[3]

§ 1242. With respect to the *mode* of taking the objection, the witness should, in strictness, be examined upon the *voir dire;* that is, he should be sworn to answer "all such questions as the Court shall demand of him." This peculiar form of oath is, however, now seldom administered; and the facts on which the objection rests, if not admitted by the opposite side, are elicited by questions put to the witness after being sworn in chief.[4] Upon such an examination, the witness, if it be necessary, may speak to the contents of written documents without producing them.[5] The objection may perhaps be also supported by evidence aliundè.

§ 1243. In proceeding to consider the law which renders the *last class* of persons, viz., those who are *insensible to the obligations of an oath,* incompetent to testify as witnesses, it[6] is proper to observe, that one of the main securities provided by the law for the purity and truth of oral testimony, is, that it be delivered under the sanction either of an *oath,* or, in a few cases, of a solemn *affirmation* or *declaration.* Indeed, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age, country, or belief, can give testimony upon any trial, civil or criminal, until he

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[1] Turner *v.* Pearte, 1 T. R. 717; Jackson *v.* Jackson, 5 Cowen, 173. But see 11 M. & W. 691. In Barbat *v.* Allen, 21 L. J., Ex., 156, Parke, B., referred to the Irish case of Birch *v.* Somerville, cited post, § 1245, in which Lord Clarendon was examined without being sworn, but the objection not having been insisted on at the time, the Court refused to disturb the verdict. [2] Niles *v.* Brackett, 15 Mass. 378.

[3] Wade *v.* Simeon, 2 Com. B. 342.

[4] See Jacobs *v.* Layborn, 11 M. & W. 685.

[5] See Butler *v.* Carver, 2 Stark. R. 433; R. *v.* Gisburn, 15 East, 57; Lunniss *v.* Row, 10 A. & E. 606; Carlisle *v.* Eady, 1 C. & P. 234; Quarterman *v.* Cox, 8 C. & P. 97; Butchers' Co. *v.* Jones, 1 Esp. 160; Botham *v.* Swingler, id. 164; Pea. R. 218, S. C.; Brockbank *v.* Anderson, 7 M. & Gr. 295, 313. [6] Gr. Ev., § 328, in part as to three lines.

have, in one form or other, given an outward pledge that he considers himself responsible to God for the truth of what he is about to narrate.[1]

§ 1244. Thus, although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict.[2] So a judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn:[3] and consequently, if he be the sole judge, it seems that he cannot depose as a witness,[4] though if he be sitting with others he may then be sworn and give evidence.[5] In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial,[6] because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.[7] It must, however, be noticed, that on several occasions, when trials have been instituted before the High Court of Parliament, peers, who have been examined as witnesses,

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[1] In some few of the British colonies, where the aborigines are "destitute of the knowledge of God and of any religious belief," ordinances have been made for the admission of the testimony of such persons without the previous sanction of an oath, and the legality of such ordinances has been recognised and established by the Legislature. See 6 & 7 Vict., c. 22.

[2] R. v. Rosser, 7 C. & P. 648, per Parke, B.; Manley v. Shaw, C. & Marsh. 361, per Tindal, C. J.; Bennet v. Hartford, Sty. 233; Fitz-James v. Moys, 1 Sid. 133; Andr. R. 321, arg.; R. v. Heath, 18 How. St. Tr. 123; R. v. Sutton, 4 M. & Sel. 532, 541, 542; 6 How. St. Tr. 1012, n.

[3] R. v. Anderson, 7 How. St. Tr. 874.

[4] Ross v. Buhler, 2 Martin's R., N. S., 312. But see 11 How. St. Tr. 459.

[5] Trial of the Regicides, Kel. 12; 5 How. St. Tr. 1181, n., S. C.

[6] Id. As to when judges are not compellable to testify, see ante, § 859.

[7] Ross v. Buhler, 2 Martin's R., N. S., 312. So is the law of Spain; Partid. 3, tit. 16, l. 19; 1 Moreau and Carleton's Tr. p. 200;—and of Scotland, Glassford Ev. 602; Tait Ev. 432; Stair's Inst. lib. 4, tit. 45, 4; Erskine's Inst. lib. 4, tit. 2, 33.

have, nevertheless, taken part in the verdict subsequently pronounced.[1] But, perhaps, these cases are not inconsistent with the law as above stated, since in trials before the House of Lords, the peers must be regarded at least as much in the light of jurors as of judges; and it has just been shown that a juryman is not disqualified from acting, simply by being called as a witness.

§ 1245. Again, though a Peer is privileged, while sitting in judgment, to give his verdict upon his honour,[2] and is also permitted to answer a bill in Chancery upon his protestation of honour, and not upon his oath,[3] he cannot be examined as a witness in any cause, whether civil or criminal, or in any court of justice, whether it be an inferior court or the House of Lords; or in any manner, whether vivâ voce, or by interrogatories, or by affidavit, unless he be first sworn;[4] for the respect which the law shows to the honour of a Peer, does not extend so far as to overturn the settled maxim, that in judicio non creditur nisi juratis.[5] If, therefore, he refuse to take the necessary oath or affirmation, he will, notwithstanding the privileges of peerage or of Parliament, be guilty of a contempt for which he may be committed and fined.[6] On a recent trial in Ireland, where the Lord-Lieutenant was called as a witness, an attestation on honour, instead of an oath, was by mistake administered to him, and he was then examined and cross-examined, without any objection being taken to the reception of his evidence. Subsequently, a motion for a new trial was made, on the ground that the testimony of an

[1] 7 How. St. Tr. 1384, 1458, 1552; 16 How. St. Tr. 1252, 1301.

[2] 2 Inst. 49.

[3] Mears *v.* Lord Stourton, 1 P. Wms. 146; 2 Salk. 512, S. C.; Gresley Ev. 65, n. *f*, 2nd Ed.; Order of Parl. 31st Dec. 1640; Beames' Ord. in Ch. 105. If a foreign sovereign sues in Chancery, and a cross bill is filed against him, he must put in his answer on oath; King of Spain *v.* Hullett, 1 Cl. & Fin. 333; 7 Bli. 359, S. C.; Duke of Brunswick *v.* King of Hanover, 6 Beav. 37.

[4] 2 How. St. Tr. 772, n.; 7 How. St. Tr. 1458; 16 How. St. Tr. 1252; R. *v.* Preston, 1 Salk. 278; Lord Shaftesbury *v.* Lord Digby, 3 Keb. 631.

[5] 2 Salk. 512; Cro. Car. 64; 1 Bl. Com. 402; 3 Bac. Abr. 202.

[6] 3 Salk. 278; 4 Lord Brougham's Speeches, 368.

unsworn witness had been received; but the Court, having ascertained that the losing party had, from the first, been aware of the irregularity, very properly held that his objection came too late, and the rule was consequently discharged.[1]

§ 1246. It seems that even the Sovereign could not now claim any exemption from the rule requiring oral testimony to be given upon oath,[2] though, on one occasion, the simple certificate of King James I., as to what had passed in his hearing, was received as evidence in the Court of Chancery.[3] The question whether the Sovereign could be examined as a witness at all, seeing that the evidence would be without temporal sanction, may admit of some doubt. The point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the King, for the purpose of proving certain conversations which he had held with him while Prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forbore from giving any opinion, and the question remains to this day undetermined.[4] In the Berkeley Peerage case counsel entertained some idea of calling the Prince Regent as a witness; but it ultimately became unnecessary to do so. On the whole, the better opinion seems to be, that the Sovereign, if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn.[5]

§ 1247.[6] The wisdom of enforcing a strict observance of the rule, which requires witnesses to be sworn, cannot well be disputed; for, although the ordinary definition of an oath,—viz. "a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth,"[7]—may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man

[1] Birch v. Somerville, 2 Ir. Law R., N. S., 243.
[2] 2 Roll. Abr. 686; Omichund v. Barker, Willes, 550.
[3] Abignye v. Clifton, Hob. 213.
[4] 2 Lord Campbell's Lives of the Chancellors, 510, 511.
[5] Id. in note.
[6] Gr. Ev., § 328, in some part.
[7] R. v. White, 1 Lea. C. C. 430; The Queen's case, 2 B. & B. 285.

to God;—not to call upon Him to punish the wrong doer, but on the witnsss to remember that He will assuredly do so;—still, it must be admitted, that by thus laying hold of the conscience of the witness, the law best insures the utterance of truth.[1] But as the administration of an oath supposes that the witness feels a moral and religious accountability to a Supreme Being, who will justly punish perjury, and from whom no secrets are hid, persons, insensible to the obligations of an oath, ought not to be admitted as witnesses. The[2] repetition of the words of an oath would, in their case, be an unmeaning formality. It makes no difference from what cause this insensibility may arise; for whether it be occasioned by irreligious opinions, or by imbecility of understanding; whether the person be an atheist, an idiot, a madman, a drunkard, or a child, so long as he is incapable of comprehending the nature, or feeling the obligation, of an oath, he cannot be sworn as a witness. The incapacity, however, is only coextensive with the defect. Thus, a monomaniac, or a person who is afflicted with partial insanity, will be an admissible witness, if the judge finds upon investigation that he is aware of the nature and sanction of an oath, and that he is capable of understanding the subject, with respect to which he is required to testify.[3] So, in the case of total madness, the occurrence of a lucid interval,[4]—in the case of intoxication, the return of sobriety,[5]—and in the case of ignorance, the receiving of due religious instruction, will render the witness competent; and the judges will occasionally postpone trials of importance, if they have good cause to believe that the witness within a reasonable time can be rendered competent to testify, and if, without his testimony, the ends of justice will probably be defeated.[6] But, if the witness be of so tender an age, that he obviously will not be capable of comprehending the meaning of an oath until after the lapse of a considerable period, a postponement of the trial will not be permitted; because, in such a case,

[1] Tyler on Oaths, 12, 15. See also Omichund *v.* Barker, 1 Atk. 21; Willes, 538, S. C.
[2] Gr. Ev., § 365, in part.
[3] R. *v.* Hill, 2 Den. 254.
[4] Com. Dig. Testmoigne, A 1.
[5] Hartford *v.* Palmer, 16 Johns. 153; Heinec. ad Pandect. Pars 3, § 14.
[6] R. *v.* White, 1 Lea. C. C. 430, n. *a*; 3 Bac. Ab. 202, n.

the loss in point of memory would more than countervail the gain in point of religious knowledge.[1] In all cases, too, the application for postponement must be made before the jury are sworn, as the Court cannot on this ground discharge the jury after the commencement of the trial.[2]

§ 1248.[3] The judges formerly held that persons *deaf and dumb* from their birth, were in contemplation of law idiots.[4] But this presumption has recently been disputed;[5] and if it be now recognised at all, it certainly has not the same force which it used to have, as persons afflicted with these calamities have been found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf mute is adduced as a witness, the Court, in the exercise of due caution, will take care to ascertain before he is examined, that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method;[6] but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.[7]

§ 1249.[8] With respect to *children*, no *precise age* is fixed by law, within which they are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion till the contrary appears; but under that age it is not so presumed; and therefore inquiry is made as to the degree of understanding which the child, offered as a witness, may possess; and if

[1] R. v. Nicholas, 2 Car. & Kir. 246, per Pollock, C. B.
[2] R. v. Wade, 1 Moo. C. C. 86; R. v. Kinloch, 18 How. St. Tr. 402, 408.
[3] Gr. Ev., § 366, in some part. [4] R. v. Steel, 1 Lea. C. C. 452.
[5] Harrod v. Harrod, 1 Kay & J. 9, per Wood, V. C.
[6] Morrison v. Lennard, 3 C. & P. 127, per Best, C. J.
[7] Id.; R. v. Ruston, 1 Lea. 408: R. v. Steel, id. 452; The State v. De Wolf, 8 Conn. 93; Com. v. Hill, 14 Mass. 207.
[8] Gr. Ev., § 367, in part.

he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be.[1] In practice, it is not unusual to receive the testimony of children of *eight* or *nine years of age*, if they appear to possess sufficient understanding; and in Brasier's case, which was an indictment for assaulting with intent to rape an infant, who was certainly under seven years of age,[2] and perhaps only five,[3] all the judges held that she might have been examined upon oath, if, on strict examination by the Court, she had been found to comprehend the danger and impiety of falsehood. But, in Pike's case,[4] Mr. Justice Park, with the concurrence of Mr. Justice James Parke, promptly rejected the dying declarations of a child of four years of age, observing that, however precocious her mind might have been, it was quite impossible that she could have had that idea of a future state, which is necessary to make such declarations admissible.[5]

§ 1250. No precise rule can be laid down respecting the *degree of intelligence* and *knowledge* which will render a child a competent witness: and, in these cases, much must ever depend upon the good sense and discretion of the judge.[6] In one case,

[1] R. v. Brasier, 1 Lea. C. C. 199; 1 East, P. C. 443; B. N. P. 293, S. C.; Jackson v. Gridley, 18 Johns. 98.

[2] 1 Lea. C. C. 199. See also R. v. Perkin, 2 Moo. C. C. 139, where Alderson, B., observed—"It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge will allow him to be sworn."

[3] 1 East, P. C. 443. [4] 3 C. & P. 598. [5] See post, p. 1121, n. 1.

[6] The utter want of discretion in dealing with this subject, which is occasionally evinced by the inferior functionaries of the law, has been admirably ridiculed by Mr. Dickens in his "Bleak House." A little crossing-sweeper being brought up before a coroner, to give evidence on an inquest, the narrative thus proceeds:—"'Name Jo. Nothing else that he knows on. * * * Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him arter he's dead if he tells a lie to the gentlemen, but believes it'll be something wery bad to punish him, and sarve him right—and so he'll tell the truth.' 'This won't do, gentlemen,' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. 'Out

where a girl, eight years old, had, subsequently to the events which she was called to prove, been twice visited by a clergyman, who had given her some instructions as to the nature of an oath, but before such visits, she had had no religious education whatever, and had never heard of a future state, and even at the trial she had no real understanding on the subject,—Mr. Justice Patteson rejected her evidence, observing, that "he must be satisfied that the child felt the binding obligation of an oath from the *general* course of her religious education; and, that the effect of the oath upon the conscience should arise from religious feelings of a *permanent* nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of the trial."[1] Perhaps the language, which the learned judge is here reported to have used, was somewhat stronger than the law warranted, and it certainly went further than the facts required, as the child, even when offered as a witness, had no real knowledge of the nature of an oath. Had not this been the case, it seems difficult to understand upon what valid ground her testimony could have been rejected; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings, or merely to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing, provided that, at the time when she was called upon to give her evidence, she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly, in Ireland it has been held, that even on an indictment for murder an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness.[2] It seems almost needless to add, that a

of the question,' says the coroner; 'you have heard the boy; *can't exactly say* won't do, you know. We can't take *that* in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside; to the great edification of the audience; especially of little Swills, the comic vocalist." P. 104.

[1] R. *v.* Williams, 7 C. & P. 320.

[2] R. *v.* Milton, Ir. Cir. Rep. 61, per Doherty, C. J.

child, like a grown person, cannot, under any circumstances, be examined in court without the sanction of an oath.[1] Neither can hearsay evidence be given of the declarations of a child, who has not capacity to be sworn.[2]

§ 1251.[3] Persons insensible to the obligations of an oath from *defect of religious sentiment and belief* are also incompetent to testify as witnesses, because the very nature of an oath, as above explained,[4] presupposes a belief in the existence of an omniscient Supreme Being, who is "the rewarder of truth and avenger of falsehood."[5] Without this belief, the person cannot be subject to that sanction, which the law deems an indispensable test of truth. It is not sufficient that a witness feels himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with that of most civilised countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses who are incapable of giving this security.[6] Atheists, therefore, and all persons professing no religion, that can bind their consciences to speak truth, are rejected as incompetent to testify as witnesses.[7]

§ 1252.[8] The rule of law, which fixes the *nature and degree of religious faith* required in a witness, seems, as at present understood, to be this;—that the person is competent to testify, if he believes in the existence of God, and that Divine punishment will be the certain consequence of perjury. It may be considered as

[1] R. *v.* Brasier, 1 Lea. C. C. 199, overruling the opinion of Lord Hale. See 1 Hale, P. C. 634.

[2] Id.; R. *v.* Nicholas, 2 Car. & Kir. 246; R. *v.* Pike, 3 C. & P. 598; 4 Bl. Com. 214; ante, § 647.

[3] Gr. Ev., § 368, in great part.

[4] Ante, § 1247.

[5] Per Lord Hardwicke, 1 Atk. 48.

[6] 1 Ph. Ev. 7.

[7] B. N. P. 292; 1 Atk. 40, 45; 1 Ph. Ev. 10.

[8] Gr. Ev., § 369, in great part.

now generally settled in this country, as well as in America, that it is not material whether the witness believes that the punishment will be inflicted in this world, or in the next. It is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath.[1]

§ 1253.[2] Defect of religious faith is *never presumed.* On the contrary the law presumes, that every man brought up in a Christian land believes in God and fears Him. The charity of its judgment is extended alike to all. The burthen is not on the party adducing the witness, to prove that he is a believer; but it is on the objecting party, to prove that he is not. Neither does the law presume, that any man is a hypocrite, but it presumes that he is what he professes to be, whether atheist or Christian; and whatever religious opinions he is proved to have once entertained, they are presumed to continue unchanged till the contrary is shown.[3] Moreover, a witness is primâ facie presumed to hold the common faith of the country; and the ordinary mode of disproving that fact, is by furnishing evidence of his declarations previously made to others; the *person himself not being interro-*

[1] The proper test of the competency of a witness on the score of religious belief was settled, upon great consideration, in the case of Omichund *v.* Barker, Willes, 545; 1 Atk. 21, S. C., to be, the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognised in Butts *v.* Swartwood, 2 Cowen, 431; The People *v.* Matteson, 2 Cowen, 433, 573, n.; and by Story, J., in Wakefield *v.* Ross, 5 Mason, 18; 9 Dane's Abr. 317, S. P. Whether any belief in a future state of existence is necessary, provided accountability to God in this life is acknowledged, is not perfectly clear. In Com. *v.* Bacheler, 4 Am. Jurist, 81, Thacher, J., seemed to think it was. But in Hunscom *v.* Hunscom, 15 Mass. 184, the Court held that mere disbelief in a future existence went only to the credibility. This degree of disbelief is not inconsistent with the faith required in Omichund *v.* Barker. The only case clearly to the contrary, is Attwood *v.* Welton, 7 Conn. 66. In Curtis *v.* Strong, 4 Day, 51, the witness did not believe in the obligation of an oath; and in Jackson *v.* Gridley, 18 Johns. 98, he was a mere atheist, without any sense of religion whatever. All that was said, in these two cases, beyond the point in judgment, was extrajudicial. In Maine, a belief in the existence of the Supreme Being is rendered sufficient by stat. 1833, c. 58, without any reference to rewards or punishments; Smith *v.* Coffin, 6 Shepl. 157.

[2] Gr. Ev., § 370, in part.

[3] Ante, § 155; The State *v.* Stinson, 7 Law Reporter, 383.

gated; for the object of interrogating a witness before he is sworn, is not to obtain the knowledge of facts, but to ascertain from his answers the extent of his capacity, and whether he has sufficient understanding to take an oath.[1]

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[1] "The witness himself is never questioned, in *modern* practice, as to his religious belief; though formerly it was otherwise. (1 Swift's Dig. 739; 5 Mason, 19; 4 Am. Jurist, 79, n.) It is not allowed even after he has been sworn. (The Queen's case, 2 B. & B. 284.) Not because it is a question tending to disgrace him; but because it would be a personal scrutiny into the state of his faith and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief; but if he voluntarily does avow it, there is no reason why the avowal should not be proved, like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions have been subsequently changed, this change will generally, if not always, be proveable in the same mode. (Attwood *v.* Welton, 7 Conn. 66; Curtis *v.* Strong, 4 Day, 51; Swift's Evid. 48—50; Mr. Christian's note to 3 Bl. Com. 369; Com. *v.* Bacheler, 4 Am. Jurist, 79, n.) If the change of opinion is very recent, this furnishes no good ground to admit the witness himself to declare it; because of the greater inconvenience, which would result from thus opening a door to fraud, than from adhering to the rule requiring other evidence of this fact. The old cases, in which the witness himself was questioned as to his belief, have on this point been *overruled.* See Christian's note to 3 Bl. Com. 369, n. 30. The law, therefore, is not reduced to any absurdity in this matter. It exercises no inquisitorial power; neither does it resort to secondary or hearsay evidence. If the witness is objected to, it asks third persons to testify, whether he has declared his disbelief in God and in a future state of rewards and punishments, &c. Of this fact they are as good witnesses as he could be; and the testimony is primary and direct. It should further be noticed, that the question, whether a person about to be sworn is an atheist or not, can never be raised by any one but an adverse party. *No stranger or volunteer has a right to object.* There must, in every instance, be a suit between two or more parties, one of whom offers the person in question as a competent witness. The presumption of law, that every citizen is a believer in the common religion of the country, holds good till it is disproved; and it would be contrary to all rule to allow any one, not party to the suit, to thrust in his objections to the course pursued by the litigants. This rule and uniform course of proceeding shows how much of the morbid sympathy, expressed for the atheist, is wasted. For there is nothing to prevent him from taking any oath of office; nor from swearing to a complaint before a magistrate; nor from making oath to his answer in Chancery. In this last case, indeed, he could not be objected to, for another reason, namely, that the plaintiff in his bill requests the Court to require him to answer upon his oath. In all these, and many other similar cases, there is no person authorised to raise an objection. Neither is the question permitted to be raised against

§ 1254. Lord Brougham's Act of 1851 to amend the Law of Evidence contains an important clause with respect to the administration of oaths. The clause is as follows:—"Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."[1]

§ 1255. All witnesses ought to be sworn according to the peculiar ceremonies of their own religion, or, in *such manner* as they *deem binding* on their consciences.[3] The doctrine of

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the atheist, where he is himself the adverse party, and offers his own oath in the ordinary course of proceeding. If he would make affidavit in his own cause to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to the loss of a paper, or to the genuineness of his books of account, or to his fears of bodily harm from one against whom he requests surety of the peace, or would take the poor debtor's oath; in these and the like cases, the uniform course is to receive his oath, like any other person's. The law, in such cases, does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man, seeking his own rights in a court of justice; and it conclusively and absolutely presumes that, so far as religious belief is concerned, all persons are capable of an oath, of whom it requires one as the condition of its protection or its aid; probably deeming it a less evil, that the solemnity of an oath should, in a few instances, be mocked by those who felt not its force and meaning, than that a citizen should in any case be deprived of the benefit and protection of the law, on the ground of his religious belief. The state of his faith is not inquired into, where his own rights are concerned. He is only prevented from being made the instrument of taking away those of others." 1 Law Reporter, pp. 347, 348.

[1] 14 & 15 Vict., c. 99, § 16. See also 18 & 19 Vict., c. 42, cited post, § 1406A, which empowers diplomatic and consular agents abroad to administer oaths and do notarial acts.

[2] Gr. Ev., § 371, in part.

[3] "Quumque sit adseveratio religiosa, satis patet, jusjurandum attemperandum esse cujusque religioni." Heinec. ad Pand. p. 3, § 13, 15. "Quodcunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex suâ ipsius animi religione," &c. Bynk. Obs. Jur. Rom. lib. 6, c. 2. See also Puff. lib. 4, c. 2, § 4. The formula of taking an oath, which was anciently adopted by the Romans, was as follows:—The witness held a flint stone in his right hand, and dropped

the civil law, which in the great case of Omichund *v.* Barker,[1] was settled to be also the rule at common law,[2] has received a legislative sanction by the Act of 1 & 2 Vict., c. 105; for that statute enacts, that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered in such form, and with such ceremonies, as the parties sworn declare to be binding on their consciences. In order to ascertain what form is so binding, the Court should inquire of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form

it as he uttered these words—Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejiciat, ut ego hunc lapidem. Adam's Ant. 247. Cic. Fam. Ep. vii. 1, 12. Under the Christian emperors it was taken, invocato Dei Omnipotentis nomine, Cod. lib. 2, tit. 4, l. 41. Sacrosanctis evangeliis tactis, Cod. lib. 3, tit. 1, l. 14. And Constantine adds, in a rescript, Jurisjurandi religione testes, priusquam perhibeant testimonium, jamdudum arctari præcipimus, Cod. lib. 4, tit. 20, l. 9. In Morgan's case, 1 Lea. C. C. 54, a Mahomedan was sworn thus—First, he placed his right hand flat upon the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: he then looked for some time upon it, and, on being asked what that ceremony was to produce, he answered that he was bound by it to speak the truth. In Scotland, members of the Kirk are sworn by the form of holding up the right hand, without touching the book or kissing it. Mildrone's case, 1 Lea. C. C. 412; Walker's case, id. 498; Mee *v.* Reid, 1 Pea. R. 23. It seems that in this case the form of words may either be, "I, A. B., swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give," &c.; or, "I swear according to the custom of my country and the religion I profess, that the evidence," &c. See 1 Lea. C. C. 412. A Jew is sworn on the Pentateuch with his head covered, Willes, 543; but if he professes Christianity, he may be sworn on the New Testament, though he has not formally renounced Judaism, R. *v.* Gilham, 1 Esp. 285. A Chinese is sworn by the ceremony of his breaking a saucer previously to the administration of the oath, R. *v.* Entrehman, C. & Marsh. 248. Roman Catholics in Ireland are sworn on a Testament, with a crucifix or cross upon it, M'Nally's Ev. 97.

[1] Willes, 538; 1 Atk. 21, S. C.

[2] Per Alderson, B., in Miller *v.* Salomons, 7 Ex. R. 534, 535, and per Pollock, C. B., id. 558.

of oath more binding.[1] Neither can a witness, who states that he is a Christian, be asked any further questions before he is sworn.[2] If a witness, without objecting, is sworn in the usual mode, but, being of a different faith, the oath was not in a form affecting his conscience,—as if, being a Jew, he was sworn on the Gospels,—he is still punishable for perjury if he swears falsely, and the adverse party cannot for this cause have a new trial.[3]

§ 1256. In some few instances, the Legislature, out of tender regard for the *conscientious scruples* of certain religious sects, has allowed them, in the place of taking an oath, to make a *solemn affirmation;* but such affirmation has the same effect as an oath, and persons who knowingly affirm what is false are equally guilty of perjury with those who falsely swear. Thus the Act of 3 & 4 Will. 4, c. 49, allows Quakers and Moravians to affirm in all cases where an oath is required;[4] the Act of 3 & 4 Will. 4, c. 82, contains a similar provision in favour of the sect of Separatists;[5] and the Act of 1 & 2 Vict., c. 77, which was passed in consequence of the decision pronounced by the judges in Doran's case,[6] extends the privilege to all persons who have been Quakers or

[1] The Queen's case, 2 B. & B. 284.

[2] R. v. Serva, 2 C. & Kir. 56, per Platt, B.

[3] Sells v. Hoare, 3 B. & B. 232; 7 Moore, 36, S. C. The State v. Whisenhurst, 2 Hawks, 458. See R. v. Wood, 1 Jebb & Bourke, Q. B., Ir. R. vii. Whether a party will be entitled to a new trial, if a witness on the other side has testified without having been sworn at all, is a question, the solution of which depends upon circumstances. If the omission of the oath was known at the time of the original trial, he will not. Birch v. Somerville, 2 Ir. Law R., N. S., 243, cited ante, § 1245; Lawrence v. Houghton, 5 Johns. 129; White v. Hawn, id. 351. But if it was not discovered till after the trial, he will; Hawks v. Baker, 6 Greenl. 72.

[4] The form is as follows:—"I, A. B., being one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be,*] do solemnly, sincerely, and truly declare and affirm," &c.

[5] This is the form:—"I, A, B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of that religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, declare and affirm," &c.

[6] 2 Moo. C. C. 37.

Moravians, but have ceased to belong to either of those sects.[1] The Common Law Procedure Act of 1854 proceeds a step further in advance, and enacts that "if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or judge or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration."[2]

§ 1257. On the ground too, that oaths should not be administered unnecessarily by public authority, it has been determined by Parliament, that *bankrupts* and their *wives* shall be examined before the English Court of Bankruptcy,[3] after making and signing a declaration to speak the truth, without being sworn on oath;[4] the Act further providing that the offence of wilfully

[1] The form is this:—"I, A. B., having been one of the people called Quakers, [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*,] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely and truly declare and affirm," &c.

[2] 17 & 18 Vict., c. 125, § 20; extended by § 103, (as limited by § 3 of 19 & 20 Vict., c. 102, Ir.,) to every Court of Civil Judicature in England; and by 18 & 19 Vict., c. 25, to every Court of Civil Judicature in Scotland; and by §§ 23 and 98 of 19 & 20 Vict., c. 102, Ir., to all Courts of Judicature in Ireland, as well criminal as all others. The form is as follows:—"I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c. § 21 of the English Act, and § 24 of the Irish Act, respectively enact, that persons wilfully making false affirmations shall be subject to the same punishment as for perjury.

[3] In the Irish Court of Bankruptcy and Insolvency these somewhat fantastical scruples are disregarded; the Act which established that court, expressly enacting that bankrupts and insolvents and their respective wives shall be examined *upon oath*. See 20 & 21 Vict., c. 60, §§ 306, 307.

[4] 12 & 13 Vict., c. 106, § 246. The form of declaration is as follows:—"I, A. B., the person declared a bankrupt under a fiat in bankruptcy, dated the day of [*or* under a petition for adjudication of bankruptcy filed on the day of in the year of our Lord], [*or*, I, C. D., the wife of A. B., declared a bankrupt under a fiat in bankruptcy dated the day of , *or* under a petition for adjudication of bankruptcy filed on

making a false statement shall render the party liable to the penalties of perjury.[1]

the day of ,] do solemnly promise and declare, that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

(*Signed*)

"A. B.,

"*or* C. D., the wife of the said A. B."

[1] 12 & 13 Vict., c. 106, § 254.

CHAPTER III.

EXAMINATION OF WITNESSES.

§ 1258.[1] HAVING thus treated of the means of procuring the attendance of witnesses, and of their competency and credibility, the manner in which they are to be *examined* must next be considered. This subject lies chiefly in the discretion of the judge before whom the cause is tried,[2] being from its very nature susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness; but the character, intelligence, courage, interest, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end. This manner and degree, therefore, as well as the other circumstances of the trial, must necessarily be left somewhat at large, subject to a few general rules, which will now be stated.

§ 1259.[3] If the judge deems it essential to the discovery of truth, that the witnesses should be *examined out of the hearing of each other*, he will order them all on both sides to withdraw, excepting the one under examination; and this order, upon the motion of either party at any period of the trial,[4] is rarely withheld, though it is not demandable of strict right.[5] The parties themselves will

[1] Gr. Ev., § 431, in part.

[2] Bastin v. Carew, Ry. & Moo. 127, per Abbott, C. J.

[3] Gr. Ev., § 432, in part.

[4] Southey v. Nash, 7 C. & P. 632.

[5] In Southey v. Nash, 7 C. & P. 632, Alderson, B., is reported to have held, that either party had a right to require that the unexamined witnesses should be out of court; but this ruling, if it be law, which is very doubtful, applies only to civil cases, since the contrary has repeatedly been held in criminal trials. See R. v. Cook, 13 How. St. Tr. 348, per Treby, C. J.; R. v. Vaughan, id. 494, per Lord Holt; R. v. Goodere, 17 id. 1015, per Sir Michael Foster. In R. v. Murphy, 8 C. & P. 307, Coleridge, J.,

sometimes be included in the order to withdraw,[1] as will also the prosecutor in a criminal proceeding, if it be proposed to examine him as a witness.[2] Where, however, an attorney in the cause is about to give testimony, an exception is usually allowed in his favour, upon a statement being made by counsel, that his personal attendance in court is necessary.[3] So, medical or other professional witnesses, who are summoned to give scientific opinions upon the circumstances of the case, as established by other testimony, will be permitted to remain in court, until this particular class of evidence commences; but then, like ordinary witnesses, they will have to withdraw, and to come in one by one so as to undergo a separate examination.[4]

§ 1260.[5] If a witness remains in court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the *contempt*;[6] and, until lately, it was considered that the judge, in the exercise of his discretion, might even exclude his testimony.[7] But it seems to be now settled, that the judge has *no right to reject the witness* on this ground, however much his wilful disobedience of the order may lessen the value of his evidence.[8] In *revenue cases*, indeed, as tried in the

observed, that it was almost a matter of right for the opposite party to have a witness out of court, while any legal argument was going on respecting his evidence.

[1] In Charnock *v.* Devings, 3 C. & Kir. 378, Talfourd, J., is reported to have held that he had no power to order the parties to leave the Court so long as they behaved with propriety. Sed qu. as to this ruling.

[2] R. *v.* Newman, 3 C. & Kir. 260, per Lord Campbell.

[3] Everett *v.* Lowdham, 4 C. & P. 91, per Bosanquet, J.; Pomeroy *v.* Baddeley, Ry. & M. 430, per Littledale, J. But a special application must be made to except him, R. *v.* Webb, Ry. & M. 431, n.

[4] See Alison Prac. Cr. L. of Sc. 489, 542—545; Tait. Ev. 420.

[5] Gr. Ev., § 432, in part.

[6] Chandler *v.* Horne, 2 M. & Rob. 423.

[7] Parker *v.* M'William, 6 Bing. 683; 4 M. & P. 480, S. C; Thomas *v.* David, 7 C. & P. 350; R. *v.* Colley, M. & M. 329; Beamon *v.* Ellice, 4 C. & P. 585; R. *v.* Wylde, 6 C. & P. 380; R. *v.* Lavin, Ir. Cir. R. 813, per Perrin, J., and Richards, B.

[8] Chandler *v.* Horne, 2 M. & Rob, 423, per Erskine, J., who stated that it was now so settled by all the judges. See also Cook *v.* Nethercote, 6 C. & P. 743, per Alderson, B.; Doe *v.* Cox, id. in note; 1 Clifford's

Exchequer, a stricter rule is said to prevail; and in order to prevent any imputation of unfairness in these delicate proceedings between the Crown and the subject, the testimony of any witness who had remained in court, whether contumaciously or not, after an order to withdraw, has hitherto been inflexibly rejected.[1] This rule does not prevail in Ireland, at least in all its strictness;[2] and as it may well be doubted whether the rule in itself is calculated to effect its object, perhaps, at the present day, it would not be rigidly enforced, even in England.

§ 1261. The practice of ordering witnesses out of court may be traced to a remote antiquity, it being noticed with approbation by Fortescue in his work De Laudibus Legum Angliæ;[3] and no man who has reflected upon the nature of evidence, or even read the quaint story of Susannah narrated in the Apocrypha,[4] but must acknowledge the utility of such a course, as an admirable means of detecting conspiracy and falsehood. In order, however, to render the practice duly efficient, it is not enough to order the witnesses simply to withdraw out of hearing, but means should be afforded for keeping them in some separate room, until they are called for; so that they might lose the opportunity, not only of listening to the examination of those who preceded them, but, what is of equal importance, of conversing with them afterwards. In Scotland,[5] all the witnesses on either side are usually shut up

Southwark Election Cas. 114, S. C.; Cobbett v. Hudson, 22 L. J., Q. B., 13, per Lord Campbell; 1 E. & B. 14, S. C.

[1] Att.-Gen. v. Bulpit, 9 Price, 4; Parker v. M'William, 6 Bing. 683; Thomas v. David, 7 C. & P. 351, per Coleridge, J.

[2] Att.-Gen. v. Sullivan, 1 Arm. Mac. & Og. 294, per Brady, C. B.

[3] His words are, "Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum." C. 26. See also Williams v. Hulie, 1 Sid. 131; Swift Ev. 512.

[4] Where Daniel detected the perjury of the two old judges, who, as eye-witnesses, had accused the wife of Joacim of adultery; but who, on being examined apart, differed as to the place where the crime was committed, the one swearing it was under a mastich tree, the other under a holm tree.

[5] It was formerly the law of Scotland, that if a witness was objected to as having remained in court without permission, his evidence could not be heard, but the Act of 3 & 4 Vict., c. 59, § 3, enacts, that "in any trial

in an apartment by themselves, whence they are successively and separately called into court to be examined;[1] and the system of separate examination also prevails theoretically, if not practically, in both Houses of Parliament.[2]

§ 1262.[3] When the competency of a witness, if objected to, is settled, he is first duly sworn in the cause by the crier[4] or other officer of the court, and is then examined by the party producing him.[5] This is called his *direct examination*, or his *examination in chief;* and in this examination, *leading questions*, that is, questions which suggest to the witness the answer desired,[6] or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative,[7] are not, in general, allowed to be put.[8] Still, this rule must be understood in a reasonable

before any judge of the court of session or court of justiciary, or before any sheriff or steward of *Scotland* it shall not be imperative on the Court to reject any witness against whom it is objected that he or she has, without the permission of the Court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the Court, in its discretion, to admit the witness, where it shall appear to the Court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

[1] Alison's Pract. 542—545; Tait Ev. 420; 2 Hume Com. 189; 19 How. St. Tr. 331, n.

[2] Taylor *v.* Lawson, 3 C. & P. 543, per Best, C. J.

[3] Gr. Ev., §§ 433, 434, 435, in part.

[4] R. *v.* Tew, 1 Pears. & Dears. C. C. 429.

[5] Formerly in the Scotch courts as soon as a witness was sworn, it was necessary for the judge to examine him *in initialibus*, that is, to ask him whether he had been instructed what to say, or had received or had been promised any good deed for what he was to say, or whether he bore any ill will to the adverse party, or had any interest in the cause, or concern in conducting it; together with his age, and whether he was married or not, and the degree of his relationship to the party adducing him, Tait Ev. 424; but now this course is no longer *necessary*, though it is still *competent* for the judge or for the party against whom the witness shall be called, to examine him *in initialibus*, as heretofore, 3 & 4 Vict., c. 59, § 2.

[6] 1 St. Ev. 169; 2 Ph. Ev. 401; Alison Pract. 545; Tait Ev. 427; How. St. Tr. 659, 660, n.

[7] Nicholls *v.* Dowding, 1 Stark. R. 81, per Lord Ellenborough.

[8] For an early instance, see R. *v.* Rosewell, 10 How. St. Tr. 190; as to

sense; for if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to that part of the examination,[1] which is merely introductory of that which is material. With respect even to material points, the judge, in his discretion, will sometimes allow leading questions to be put in a direct examination; as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence.[2] Indeed, if the witness stand in a situation, which of necessity makes him adverse to the party calling him, as, if he be a defendant whom the plaintiff wishes to examine, leading questions may, it seems, be asked him as a matter of right.[3] So, on the trial of an issue *devisavit vel non,* directed by the Court of Chancery, if the plaintiff, in obedience to the rule of that court, calls the second attesting witness, whose evidence tends to prove the insanity of the testator, he will be allowed to put questions to him in the nature of a cross-examination; because in cases of this kind, as the witness is rather the witness of the Court than of the party, considerable latitude in the mode of conducting the examination should, in common fairness, be permitted.[4]

§ 1263. Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by *want of recollection,* which a *suggestion* may assist. Thus, when a witness stated that he could not recollect the names of the

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what will be regarded as leading interrogatories in a Court of Equity, see Gregory v. Marychurch, 12 Beav. 398; Lincoln v. Wright, 4 Beav. 166.

[1] Nicholls v. Dowding, 1 Stark. R. 81, per Lord Ellenborough.

[2] R. v. Chapman, 8 C. & P. 559, per Lord Abinger; R. v. Ball, id. 745; R. v. Murphy, id. 306—308, per Coleridge, J.; Clarke v. Saffery, Ry. & M. 126, per Best, C. J.; Parkin v. Moon, 7 C. & P. 409, per Alderson, B.

[3] Clarke v. Saffery, Ry. & M. 126.

[4] Bowman v. Bowman, 2 M. & Rob. 501, per Cresswell, J.

members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognise them if suggested, this was permitted to be done.[1] So, for the purpose of identification, the witness may be directed to look at a particular person, and say whether he is the man.[2] So,[3] where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it; as, where he is called to contradict another respecting the contents of a lost letter, and cannot, off-hand, recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted.[4] So, where a witness is called to contradict another, who has denied having used certain expressions, counsel are sometimes permitted to ask, whether the particular words denied were not in fact uttered by the former witness;[5] but this rule seems only to apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible.[6] Again, the Court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation;[7] and indeed, it must always be remembered, that the judge has a discretionary power, —not controllable on a bill of exceptions,[8]—of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require.[9]

§ 1264.[10] Though a witness can testify only to such facts as are within his own knowledge and recollection, he is sometimes

[1] Acerro v. Petroni, 1 Stark. R. 100, per Lord Ellenborough.
[2] R. v. Watson, 32 How. St. Tr. 74, per Lord Ellenborough; 2 Stark. R. 128, S. C.; R. v. Berenger, 2 Stark. R. 129, n., per id.
[3] Gr. Ev., § 435, in part.
[4] Courteen v. Touse, 1 Camp. 43, per Lord Ellenborough.
[5] Edmonds v. Walter, 3 Stark. R. 8, per Abbott, C. J.
[6] Hallett v. Cousens, 2 M. & Rob. 238, per Erskine, J.
[7] Moody v. Rowell, 17 Pick. 498.
[8] Lawdon v. Lawdon, 5 Ir. L. R., N. S., 27.
[9] Moody v. Rowell, 17 Pick. 498. [10] Gr. Ev., §§ 436, 438, in part.

permitted to *refresh* and assist his *memory, by the use of a written instrument*, memorandum, or entry in a book.[1] But this course, excepting in the case of scientific witnesses referring to professional books as the foundation of their opinions,[2] can only be adopted, where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable, that the memory of the witness had not then become defective.[3] In one Scotch case, the majority of the Court would not allow a witness to consult notes, which he had prepared *some weeks* after the transactions had occurred, and when he had reason to believe that he should be called to give evidence.[4] And, in another case, the witness was not permitted to refresh his memory with the copy of a paper taken by himself *six months* after he made the original, though the original was proved to have become illegible; the learned judge saying, that the witness could only look at the original memorandum made *near* the time.[5] In all cases of this kind the practice must be governed by the peculiar circumstances; but, perhaps, if the witness will swear positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred.[6] If, how-

[1] The law on this subject is thus laid down in the New York Civ. Code, § 1843, "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he know that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution."

[2] As to this practice, see post, §§ 1279, 1280.

[3] R. *v.* Horne Tooke, cited 25 How. St. Tr. 936; Burrough *v.* Martin, 2 Camp. 112; Smith *v.* Morgan, 2 M. & Rob. 257; Wood *v.* Cooper, 1 C. & Kir. 645.

[4] R. *v.* Sir A. Gordon Kinloch, 25 How. St. Tr. 934—937.

[5] Jones *v.* Stroud, 2 C. & P. 196, per Best, C. J.

[6] R. *v.* Sir A. Gordon Kinloch, 25 How. St. Tr. 937; Wood *v.* Cooper, 1 C. & Kir. 646, per Pollock, C. B.

ever, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his attorney, they can in no case be permitted to be used, for otherwise a door might be opened to the grossest fraud. Therefore, where a witness had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, the Court would not allow him to refer to it.[1] And where a witness had himself noted down the transactions as they occurred, but had requested the solicitor for the party she supported to digest her notes into the form of minutes, which she had afterwards revised and transcribed, Lord Chancellor Hardwicke indignantly suppressed her deposition, she having had recourse to these minutes for the purpose of refreshing her memory.[2]

§ 1265. Whether the witness can refresh his memory by referring to a mere *copy* of his original memorandum is a question of some difficulty and doubt. In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from *his own recollection*;[3] but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness, either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy. Even then, it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained: for there is much weight in the remark of Mr. Justice Patteson, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory.[4]

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[1] Steinkeller *v.* Newton, 9 C. & P. 315, per Tindal, C. J.

[2] Anon., cited by Lord Kenyon in Doe *v.* Perkins, 3 T. R. 752—754. See Sayer *v.* Wagstaff, 5 Beav. 462.

[3] Tanner *v.* Taylor, cited per Buller, J., in Doe *v.* Perkins, 3 T. R. 754, as decided by Legge, B.; Anon., per Bayley, J., 1 Lew. C. C. 101; Duchess of Kingston's case, 20 How. St. Tr. 619; R. *v.* Hedges, 28 How. St. Tr. 1367.

[4] Burton *v.* Plummer, 2 A. & E. 344. See also Jones *v.* Stroud, 2 C. & P. 196.

§ 1266. Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no *independent* recollection of the facts narrated therein, the original must be used.[1] The case of Burton *v.* Plummer[2] in no way contravenes this rule. There, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger. The transactions in trade had been noted by the clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the time checked by the clerk. Under these circumstances, the Court very properly regarded the ledger as an original, and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in Horne *v.* Mackenzie,[3] where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid.

§ 1267. Before a witness can refresh his memory by looking at memoranda, it seems to be further necessary that they should have been made, either *by the witness* himself, or *by some person in his presence*,[4] or, at least, that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly

[1] Doe *v.* Perkins, 3 T. R. 749; explained by Patteson, J., in 2 A. & E. 215; R. *v.* Hedges, 28 How. St. Tr. 1367, per Lord Ellenborough; Solomons *v.* Campbell, cited 1 St. Ev. 177, 178, n., per Abbott, C. J.; Beech *v.* Jones, 5 Com. B. 696; Alcock *v.* The Royal Exchange Ins. Co., 13 Q. B. 292.

[2] 2 A. & E. 341.

[3] 6 Cl. & Fin. 628, 630, 645. See also Topham *v.* Macgregor, 1 C. & Kir. 320, where the writer of an article in a newspaper was allowed to refresh his memory by the paper, his MS. being proved to be lost.

[4] Duchess of Kingston's case, 20 How. St. Tr. 619.

stated. In accordance with the last part of this rule, a witness has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him.[1] So, where it has been material to prove the date of an act of bankruptcy, the Court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them.[2] So, where a witness called on behalf of a prosecution makes a statement in his examination in chief inconsistent with what he has previously sworn before the magistrates, or the coroner, the counsel for the Crown may show him his deposition, for the purpose of refreshing his memory, and may then repeat the question in a leading form.[3] Again, if the witness has checked an entry made by another person;[4] or has actually seen money paid and a receipt given;[5] or has read a memorandum to a party who had assented to its terms;[6] in all these, and the like cases, he will be allowed to look at the document itself, for the purpose of refreshing his memory as to the facts mentioned therein. In one or two cases a greater latitude is said to have prevailed; and witnesses are reported to have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes.[7] These cases, however, can scarcely be regarded as authorities, and are certainly opposed in spirit to a decision of Lord Tenterden's,[8] where a witness, having denied on cross-examination that he was ever sentenced to imprisonment,

[1] Burrough v. Martin, 2 Camp. 112, per Lord Ellenborough; Anderson v. Whalley, 3 C. & Kir. 54.

[2] Smith v. Morgan, 2 M. & Rob. 257, per Tindal, C. J.; Wood v. Cooper, 1 C. & Kir. 645, per Pollock, C. B.; Vaughan v. Martin, 1 Esp. 440, per Lord Kenyon.

[3] R. v. Williams, 6 Cox Cr. Cas. 343, per Williams, J. See post, § 1284.

[4] Burton v. Plummer, 2 A. & E. 341.

[5] Rambert v. Cohen, 4 Esp. 213, per Lord Ellenborough.

[6] Bolton v. Tomlin, 5 A. & E. 856; Jacob v. Lindsay, 1 East, 459; R. v. St. Martin's, Leicester, 2 A. & E. 210.

[7] Lawes v. Reed, 2 Lew. C. C. 152, per Alderson, B., citing Balme v. Hutton, as a similar case. See also Henry v. Lee, 2 Chit. R. 124.

[8] Meagoe v. Simmons, 3 C. & P. 75.

was not permitted under the old law to have his memory refreshed by a copy of his conviction.[1]

§ 1268. As a writing, used to refresh the memory, does not thereby become evidence of itself,[2] it is *not necessary* that it should even be *admissible*; and therefore a receipt which cannot be read for want of a stamp, may yet be referred to by the witness in giving his evidence.[3] Neither is it essential that notes used by a witness, who is called to prove a conversation, a speech, or the like, should contain a verbatim account of all that was uttered. Thus, where it appeared, that a short-hand writer had taken a verbatim note of such parts of an address as he deemed material, and was merely able to swear to the substantial correctness of the remainder, he was permitted to read the whole; though it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fullness, and consequent accuracy, of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone.[4] If the witness has become *blind*, the paper may be read over to him, in order to excite his recollection.[5]

§ 1269. In order that a document may be used as the refresher of memory, it is by *no means necessary* that the witness, after having seen it, should have any *independent recollection* of the facts mentioned therein, or connected therewith; but it will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even, if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of

[1] See now 17 & 18 Vict., c. 125, § 25; and 19 & 20 Vict., c. 102, § 28, Ir., cited post, § 1294.

[2] Alcock *v.* The Royal Exchange Ins. Co., 13 Q. B. 292.

[3] Maugham *v.* Hubbard, 8 B. & C. 14; Jacob *v.* Lindsay, 1 East, 459; Rambert *v.* Cohen, 4 Esp. 213, per Lord Ellenborough; Catt *v.* Howard, 3 Stark. R. 3, per Abbott, C. J.

[4] R. *v.* O'Connell, Armstr. & Trev. R. 165—167.

[5] Catt *v.* Howard, 3 Stark. R. 3, per Abbott, C. J.; Vaughan *v.* Martin, 1 Esp. 440, per Lord Kenyon.

the memorandum, or swear to the particular fact in question. Thus, where an agent, who had made a parol lease, and entered a memorandum of the terms in a book, stated that he had no memory of the transaction but from the book, though on reading the entry he entertained no doubt that the fact really happened, it was held sufficient;[1] and a barrister, called to prove that a witness had materially varied his account since the last trial, has been allowed to refresh his memory by the notes on his brief, though he had no independent recollection of what took place on the former occasion.[2] Another example[3] of this kind, is where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to swear positively that it passed through his hands. So, where a witness, from seeing his own signature to the attestation of a deed, says that he is therefore sure that he saw the party execute it, this is sufficient proof of the execution, though he adds that he has no recollection of the fact.[4]

§ 1270. In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable,[5] —and if the witness has no independent recollection of the fact, it is necessary,—that they should be produced at the trial,[6] and that the *opposite counsel* should have an *opportunity of inspecting* them, in order that on cross, or re-examination, he may have the benefit of the witness's refreshing his memory by every part.[7]

[1] R. *v.* St. Martin's, Leicester, 2 A. & E. 210. See also Haig *v.* Newton, 1 Const. R. 423; Sharpe *v.* Bingley, id. 343; Maugham *v.* Hubbard, 8 B. & C. 14. [2] R. *v.* Guinea, Ir. Cir. R. 167, per Crampton, J.

[3] Gr. Ev., § 437, in great part, for seven lines.

[4] Maugham *v.* Hubbard, 8 B. & C. 16, per Bayley, J.; R. *v.* St. Martin's, Leicester, 2 A. & E. 213, per Taunton, J.; Russell *v.* Coffin, 8 Pick. 143, 150; Jackson *v.* Christman, 4 Wend. 277, 282; Pigott *v.* Holloway, 1 Binn. 436; Smith *v.* Lane, 12 Serg. & R. 84, per Gibson, J.; Clark *v.* Vorce, 15 Wend. 193.

[5] R. *v.* Hardy, 24 How. St. Tr. 824, per Eyre, C. J.

[6] Beech *v.* Jones, 5 Com. B. 696.

[7] Howard *v.* Canfield, 5 Dowl. 417, per Coleridge, J.; R. *v.* St. Martin's, Leicester, 2 A. & E. 215, per Patteson, J.; Sinclair *v.* Stevenson, 1 C. & P. 583, per Best, C. J.; Loyd *v.* Freshfield, 2 C. & P. 332; Dupuy *v.* Truman, 2 You. & Coll. Ch. R. 341; Lord *v.* Colvin, 2 Drew. 205.

Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to;[1] but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence.[2] If a paper be put into the hand of a witness, merely to prove handwriting, and not to refresh his memory,[3] or if, being given to the witness for the purpose of

[1] R. v. Ramsden, 2 C. & P. 604, per Lord Tenterden; Gregory v. Tavernor, 6 C. & P. 281, per Gurney, B.

[2] Gregory v. Tavernor, 6 C. & P. 281. See Stephens v. Foster, 6 C. & P. 289.

[3] Russell v. Rider, 6 C. & P. 416; Sinclair v. Stevenson, 1 C. & P. 583; Lord v. Colvin, 2 Drew. 205, per Kindersley, V. C.; S. C., before the Lords Justices, 5 De Gex, M. & Gord. 47; 23 L. J., Ch., 469, S. C. In Scotland, the subiect of the use and proper office of writings, in restoring the recollection of witnesses, is stated with precision by Mr. Alison, in his able and philosophical Treatise on the Practice of the Criminal Law. "It is frequently made a question," he observes, "whether a witness may refer to notes or memorandums made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow witnesses to look to memorandums made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury, as his evidence, he having first sworn, that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears, that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained, than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memorandums, notes, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and vivâ voce examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certifi-

refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it.

§ 1271. Unless evidence of reputation be admissible,[2] witnesses must, in general, merely speak to *facts* within their own knowledge; and they will not be permitted, excepting under the circumstances that will presently be mentioned,[3] to express their own *belief* or *opinion*. For instance, where goods had been supplied to a firm, and the question raised by a plea of abatement was, whether the defendant had held himself out to the plaintiff as the only person composing the firm, a witness, who proved the giving

cates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a farther examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, utitur jure communi, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memorandums of dates, &c., made up at the time, to refresh his memory, like any other person put into the box." Pp. 540—542.

[1] R. *v.* Duncombe, 8 C. & P. 369, per Lord Denman; Lord *v.* Colvin, 2 Drew. 205; S. C., before the Lords Justices, 23 L. J., Ch., 469; 5 De Gex, M. & Gord. 47, S. C. In Holland *v.* Reeves, 7 C. & P. 39, a party put a document into the hands of an adverse witness, and cross-examined him upon it, whereupon he was required by the opposite counsel to have it read forthwith; but Alderson, B., held, that the cross-examining party was not bound to put in the document, until he had opened his own case. It would seem, however, in such a case, that the opposite counsel would have a right to inspect the document, in order to found questions upon it in re-examination. See post, §§ 1301, 1307. [2] Ante, § 543. [3] Post, §§ 1273—1281.

of the order by the defendant, was not allowed to be asked with whom he dealt, because such a question was only a skilful mode of ascertaining the witness's opinion, which might be founded on hearsay evidence; and the Court held, that the only proper inquiry was as to the acts done.[1] So, in an action of slander, if the words used are alleged to have been spoken in a sense different from their ordinary meaning, a by-stander cannot be asked, in the first instance, what he understood by them,[2] but the proper course will be to ask the witness, whether there was anything to prevent the words from conveying the meaning which they ordinarily would convey to him; and then, if he states any facts which lead to the inference that they were used in a peculiar sense, a foundation will have been laid for the question, "What did you understand by those words?"[3]

§ 1272.[4] But, though a witness, in general, must depose to such *facts* only as are *within his own knowledge*,[5] the law does not require him to speak with such expression of *certainty* as to exclude all doubt. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may state what he remembers concerning it, and leave the jury to judge of the weight of his testimony.[6] But if the impression on his mind be so slight as to justify the belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected.[7]

§ 1273.[8] On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question from other facts, pro-

[1] Bonfield *v.* Smith, 12 M. & W. 405.

[2] D. of Brunswick *v.* Harmer, 3 C. & Kir. 10.

[3] Daines *v.* Hartley, 3 Ex. R. 200.

[4] Gr. Ev., § 440, in part.

[5] As to evidence of reputation, see ante, § 543.

[6] Miller's case, 3 Wils. 427, per De Grey, C. J.; 2 W. Bl. 886, S. C.; Carmalt *v.* Post, 8 Watts, 411, per Gibson, C. J.; R. *v.* Stafford, 7 How. St. Tr. 1378, per Lord H. St. Finch.

[7] Clark *v.* Bigelow, 4 Shepl. 246.

[8] Gr. Ev., § 440, in part.

vided these last facts be within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his *belief*, is equally liable to be convicted of perjury, with the man who swears positively to a fact which he knows to be untrue.[1] The only difference is, that proof of the commission of the crime is more difficult in the one case than in the other. In conformity with this rule, which admits evidence of opinion on the ground of necessity, witnesses are constantly permitted to express their belief respecting the *identity* of persons and things, as also respecting the genuineness of disputed *handwriting*.[2] So, in a petition for damages on the ground of adultery,[3] or in an action for breach of promise of marriage, any person who has been in a position to observe the mutual deportment of the parties, may give in evidence his opinion upon the question, whether or not they were attached to each other.[4] In America it has been determined upon grave consideration, and in conformity with the doctrine which has always prevailed in our ecclesiastical courts,[5] that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation.[6] So, also, in that country, the subscribing witnesses to a will may testify their opinions, with respect to the sanity of the testator at the time of executing the will; for the law has placed them about the testator, to ascertain and judge of his capacity.[7]

§ 1274.[8] This lax mode of examination, however, chiefly pre-

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[1] R. *v.* Pedley, 1 Lea. C. C. 327, per Lord Mansfield; Miller's case, 2 W. Bl. 885, 886, per De Grey, C. J.; 3 Wils. 420, S. C.; Folkes *v.* Chadd, 3 Doug. 159, per Lord Mansfield; R. *v.* Schlesinger, 10 Q. B. 670.

[2] As to proof of handwriting, see post, § 1660, et seq.; Folkes *v.* Chadd, 3 Doug. 159, per Lord Mansfield. [3] See 20 & 21 Vict., c. 85, § 33.

[4] Trelawney *v.* Colman, 2 Stark. R. 192, per Holroyd, J.; M'Kee *v.* Nelson, 4 Cowen, 355.

[5] Wheeler *v.* Alderson, 3 Hagg. Ecc. R. 574, 604, 605.

[6] Clary *v.* Clary, 2 Iredell R. 78.

[7] Chase *v.* Lincoln, 3 Mass. 237; Poole *v.* Richardson. id. 330; Rambler *v.* Tryon, 7 Serg. & R. 90, 92; Buckminster *v.* Perry, 4 Mass. 590; Grant *v.* Thompson, 4 Conn. 203. See also Wogan *v.* Small, 11 Serg. & R. 141; Sheafe *v.* Rowe, 2 Lee's R. 415. [8] Gr. Ev., § 440, in part.

vails on questions of *science* or trade, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called *experts*, are allowed, not only to testify to facts, but to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted, as to the cause of disease or death, or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances; and as to other subjects of professional skill.[1] So, inspectors of franks have been examined to their belief, as to whether the writing of an instrument was in a feigned hand, and also as to whether two documents, supposed to have been written in a disguised hand, were written by the same person.[2] So, antiquaries have been called to fix, by conjecture, the date of ancient handwriting;[3] and practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries.[4] So, a secretary of a fire-insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county-commissioner had frequently estimated damages occasioned by the laying out of railroads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building upon the value of the rent, and the increase of the rate of insurance against fire.[5] So, where the question was, whether a paper had contained certain pencil-marks, which were alleged to have been rubbed out, the opinion of an engraver who had examined the paper with a mirror, was held to be admissible evidence, valeat quantum.[6] Seal-engravers, also, may be called to give their opinion upon an impression, whether it

[1] 1 St. Ev. 175; Tait Ev. 433; R. v. Wright, R. & R. 456; Hathorn v. King, 8 Mass. 371; Collett v. Collett, 1 Curteis, 687.

[2] Goodtitle v. Braham, 4 T. R. 497.

[3] Tracy Peerage, 10 Cl. & Fin. 191.

[4] Davis v. Mason, 4 Pick. 156.

[5] Webber v. East. Rail. Co., 2 Metc. 147. Where a point, involving questions of practical science, is in dispute in Chancery, the Court will advise a reference to an expert in that science for his opinion on the facts; and the report of such party will be adopted by the Court as the ground of its order. Webb v. Manchester and Leeds Rail. Co., 4 Myl. & Cr. 120, 121; 1 Rail. Cas. 576, S. C.

[6] R. v. Williams, 8 C. & P. 434, per Parke, B., and Tindal, C. J.

was made from an original seal, or from another impression.[1] So, the opinion of an artist in painting is evidence of the originality of a picture. And it seems, that the genuineness of a postmark may be proved by the opinion of a clerk of the post-office, or, perhaps, of any one, who has been in the habit of receiving letters with that mark.[2]

§ 1275.[3] Where the question was whether a bank, which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific engineers, as to the effect of such an embankment upon the harbour, were held admissible evidence.[4] So, naturalists, who have observed the habits of certain fish, have been permitted to state their opinions as to the ability of the fish to overcome particular obstructions in the rivers which they are accustomed to ascend.[5] So, in the case of Bradley *v.* Arthur,[6] the opinion of experienced officers was taken respecting a question of military practice, and the Court held that such evidence was clearly admissible, though the Lord Chief Justice was unwilling to attach to it any great weight. In short, it may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature.[7]

§ 1276. On the other hand, it seems equally clear, that the opinions of skilled witnesses cannot be received, when the inquiry relates to a subject which does not require any peculiar habits, or course of study, in order to qualify a man to understand it.[8]

[1] Per Lord Mansfield, in Folkes *v.* Chadd, 3 Doug. 157.

[2] Abbey *v.* Lill, 5 Bing. 299, 304, per Gaselee, J.; Fletcher *v.* Braddyll, 3 Stark. R. 64; Woodcock *v.* Houldsworth, 16 M. & W. 124.

[3] Gr. Ev., § 440, in part.

[4] Folkes *v.* Chadd, 3 Doug. 157.

[5] Cottrill *v.* Myrick, 3 Fairf. 222.

[6] 4 B. & C. 295, 305, 307, 311. See also Barwis *v.* Keppel, 2 Wils. 314.

[7] 1 Smith Lea. Ca. 286, note to Carter *v.* Boehm; id. 426, 427, 4th ed.

[8] Id.

Therefore[1] witnesses are not permitted to state *their views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced*, had the parties acted in one way rather than another.[2] Thus, the opinions of medical practitioners upon the question, whether a certain physician had honourably and faithfully discharged his duty to his medical brethren, have been rejected; because, on such a point, the jury were as capable of forming a judgment as the witnesses themselves.[3]

§ 1277. In some cases it may be difficult to determine whether the particular question be one of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it. Thus, if an action be brought on a policy of insurance, and the question be, whether facts withheld from the underwriter were material, can persons conversant with the business of insurance be asked their opinions on the subject? Or if the action be against the insurance broker for negligence, in not drawing, or in not altering, a policy according to instructions, can other brokers be called to state their opinions as to what the conduct of persons similarly situated ought to have been? To these queries no satisfactory answer can be given, as the Court of Queen's Bench has said that such evidence cannot be received,[4] while the Court of Common Pleas has determined that it can.[5] In Greville *v.* Chapman,[6] which was an action for a libel, imputing to the plaintiff dishonourable conduct in withdrawing a horse, which had been entered for a race, and against which he had betted, a witness for the plaintiff on cross-

[1] Gr. Ev., § 441, in part.

[2] Campbell *v.* Rickards, 5 B. & Ad. 846, per Lord Denman.

[3] Ramadge *v.* Ryan, 9 Bing. 333.

[4] Campbell *v.* Rickards, 5 B. & Ad. 840; 2 N. & M. 542, S. C.; relying on Carter *v.* Boehm, 3 Burr. 905, 913, 914; and Durrell *v.* Bederley, Holt, N. P. R. 283, per Gibbs, J. See also Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 79.

[5] Chapman *v.* Walton, 10 Bing. 57; 3 M. & Sc. 389, S. C.; relying on Rickards *v.* Murdock, 10 B. & C. 527; and Berthon *v.* Loughman, 2 Stark. R. 258, per Holroyd, J. See further, 1 Smith Lea. Ca. 283—286; id. 422—428, 4th ed.; Lindenau *v.* Desborough, 8 B. & C. 586.

[6] 5 Q. B. 731. It is not probable that the courts would sanction any extension of the doctrine here propounded.

examination stated, that by the rules of the Jockey Club, a man might bet against his own horse, and then withdraw him without assigning any reason, and that, in such a case, he would be entitled to receive the amount of the wager. On re-examination, he was asked his opinion respecting the morality of such conduct, and the Court held, that this question might properly be put with the view of arriving at the real meaning of the rules.

§ 1278. The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case, as proved by other witnesses* on the trial.[1] But here the witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine. For instance, if the question be whether a particular act, for which a prisoner is tried, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.[2] Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though it cannot be insisted on as a matter of right.[3] An objection, too, is the less likely to be taken to this course under ordinary circumstances, as no practical benefit would result from taking it; for the counsel examining may always attain his object by putting the question hypothetically; that is, by desiring the witness first to assume such and such facts to be true, and then to state his opinion as to the prisoner's state of mind.[4] So, in an action for unskilfully navigating a ship, though a Master of the

[1] R. v. Wright, R. & R. 456; R. v. Searle, 1 M. & Rob. 75, per Park, J.; Fenwick v. Bell, 1 C. & Kir. 312; Beckwith v. Sydebotham, 1 Camp. 117; Collett v. Collett, 1 Curteis, 687.

[2] M'Naghten's case, 10 Cl. & Fin. 200, 211, 212; 1 C. & Kir. 135, 136; 8 Scott's N. R. 595, S. C. [3] Id. [4] R. v. Wright, R. & R. 456.

Trinity House, or other nautical witness, cannot in strictness be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated;—for, in answering such a question, the witness would have to draw a conclusion of fact, as well as to give his opinion upon it;[1]—yet he may be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true.[2] So, upon a question of sea-worthiness, experienced shipwrights have frequently been called to give an opinion as to whether a ship in the state in which the one in question was sworn to be on a certain day of the voyage, could have been sea-worthy when the policy was effected.[3]

§ 1279. It would seem, that in all cases where skilled witnesses are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises.[4] For instance, though medical books are not directly admissible in evidence,[5] no good reason can be given, why a physician should not be allowed to strengthen his recollection by referring to such as he considers to be works of authority; or why he should not be asked, after such a reference, whether his judgment was or was not thereby confirmed. It does not, however, appear, that this course has ever been directly sanctioned; though a medical witness has been asked whether, in the course of his reading, he has not found a certain mode of treatment prescribed; and he has also been permitted, while explaining the grounds of his opinion, to state that his judgment was founded in part on the writings of his professional brethren.[6]

§ 1280. In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of *the laws*, as well written as

[1] Sills *v.* Brown, 9 C. & P. 604, 605, per Coleridge, J. See also Jameson *v.* Drinkald, 12 Moore, 148.

[2] Fenwick *v.* Bell, 1 C. & Kir. 312, per Coltman, J.; Malton *v.* Nesbit 1 C. & P. 72, per Abbott, C. J.

[3] Beckwith *v.* Sydebotham, 1 Camp. 116, 117, per Lord Ellenborough; Thornton *v.* Roy. Ex. Ass. Co., Pea. R. 25, per Lord Kenyon.

[4] See post, § 1280, ad fin.

[5] Collier *v.* Simpson, 5 C. & P. 74, per Tindal, C. J. [6] Id. 73.

unwritten, and of the usages and customs of *foreign states*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject.[1] Thus, in the great case of Dalrymple *v.* Dalrymple,[2] where the point for the decision of the Court turned on the state of the Scotch Marriage Law, the depositions of eminent Scottish lawyers were given in evidence, and carefully sifted and compared by Sir William Scott in his admirable judgment. It seems to have been thought at one time, that all foreign *written* law must be proved by a copy properly authenticated;[3] but this doctrine is now distinctly exploded;[4] the House of Lords having determined,[5] in accordance with a decision of the Court of Queen's Bench,[6] that whenever foreign written law is to be proved, that proof cannot

[1] See ante, §§ 5, 40.

[2] 2 Hagg. Cons. R. 54. See also R. *v.* Povey, 22 L. J., M. C., 19; 1 Pearce, C. C. 32; 6 Cox, Cr. Cas. 83, S. C.

[3] R. *v.* Picton, 30 How. St. Tr. 491, per Lord Ellenborough; Clegg *v.* Levy, 3 Camp. 166, per id.; Millar *v.* Heinrick, 4 Camp. 155, per Gibbs, C. J.; Freemoult *v.* Dedire, 1 P. Wms. 431; Boehtlinck *v.* Schneider, 3 Esp. 58, per Lord Kenyon.

[4] Lord Brougham, in his able sketch of Lord Stowell, thus explains the duty of a judge in dealing with questions of foreign law:—"It is possibly hypercritical to remark one inaccurate view which pervades a portion of this judgment [in Dalrymple *v.* Dalrymple]. Although the Scottish law was of course only matter of evidence before Sir W. Scott, and as such for the most part dealt with by him, he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer. Now, strictly speaking, he could not look at those text-writers, nor even at the decisions of judges, except only so far as they had been referred to by the witnesses, the skilful persons, the Scottish lawyers, whose testimony alone he was entitled to consider. For *they* alone could deal with either dicta of text-writers or decisions of courts. *He* had no means of approaching such things, nor could avoid falling into errors when he endeavoured to understand their meaning, and still more when he attempted to weigh them and to compare them together. This at least is the strict view of the matter; and in many cases the fact would bear it out. Thus we constantly see gross errors committed by Scottish and French lawyers of eminence when they think they can apply an English authority. But in the case to which we are referring, the learned judge certainly dealt as happily, and as safely, and as successfully, with the authorities, as with the conflicting testimonies which it was his more proper province to sift and to compare." Statesmen of the Time of Geo. 3, 2nd Ser. 76.

[5] Sussex Peer., 11 Cl. & Fin. 85, 114—117.

[6] Baron de Bode's case, 8 Q. B., 208, 250—267.

be taken from the book of the law, but must be derived from some skilled witness who describes the law. For instance, if any question were to arise in a British court of justice respecting the existence or meaning of a French law, it would not suffice to produce the Code Napoleon, because the Court would not have organs to deal with and construe its provisions; but the assistance of foreign lawyers, who knew how to interpret it, must of necessity be prayed in aid.[1] Still the witness may refresh and confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents, or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence per se, but as part and parcel of his testimony.[2]

§ 1281. In order to render a witness competent to give evidence on a point of foreign law, he must either be a *professional man* belonging to the country whose laws are in question, or at least he must hold *some official situation,* which presumes, because it requires, sufficient knowledge.[3] Thus, a judge, an advocate, a barrister, or an attorney, will be an admissible witness to prove the laws of his own country; and an attorney-general, though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii.*[4] So, a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law.[5] Whether a French *vice-consul* here would be allowed to prove the law of France as a person officially skilled, may admit of some doubt,

[1] Sussex Peer., 11 Cl. & Fin. 115, per Lord Brougham. See also Lord Nelson *v.* Lord Bridport, 8 Beav. 527, where this subject is very ably treated by Lord Langdale, M. R. See, too, Cocks *v.* Purday, 2 C. & Kir. 269.

[2] Sussex Peer., 11 Cl. & Fin. 114—117; Lord Nelson *v.* Lord Bridport, 8 Beav. 527.

[3] Id. 11 Cl. & Fin. 134.

[4] Id. 124, per Lord Brougham; R. *v.* Picton, 30 How. St. Tr. 509—512; Ward *v.* Dey, 7 Ec. & Mar. Cas. 96, 101—106.

[5] Sussex Peer., 11 Cl. & Fin. 84, 117—134.

though on one occasion the testimony of such a person was admitted by Lord Tenterden.[1] Be this as it may, the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it at a university in another country.[2] Neither, as it seems, can a merchant or other person, who holds no official situation, and who is unconnected with the legal profession, be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject.[3] If the question, however, relates to a foreign *custom* or *usage*, any witness will be admissible who is acquainted with the fact;[4] and, therefore, a London hotel-keeper, who was formerly a merchant and stockbroker at Brussels, has been permitted to prove the mercantile usage in Belgium, with respect to the presentment of a promissory note that was made payable in a particular place.[5]

§ 1282. The question how far a party is at liberty to discredit his own witness, is one which for years has been agitated in Westminster Hall,[6] and which at length has been settled by the Legislature. The Common Law Procedure Act of 1854,[7] contains, in § 22, the following salutary enactment on this subject:—"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, *by leave of the judge*, prove that he has made at other times a statement inconsistent with his present testimony;[8] but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to

[1] Lacon *v.* Higgins, 3 Stark. R. 178; D. & Ry., N. P. C., 38, S C.

[2] Bristow *v.* Sequeville, 5 Ex. R. 275; 3 C. & Kir. 64, S. C., nom. Bristow *v.* De Secqueville.

[3] Per Lord Lyndhurst, C., stating the unanimous opinion of the judges and the Lords, in Sussex Peer., 11 Cl. & Fin. 134, and overruling R. *v.* Dent, 1 C. & Kir. 97.

[4] Ganer *v.* Lanesborough, 1 Pea. R. 18; explained by Lord Lyndhurst, C., in Sussex Peer., 11 Cl. & Fin. 124. See Mostyn *v.* Fabrigas, 1 Cowp. 174, per Lord Mansfield; Feaubert *v.* Turst, Prec. Ch. 207.

[5] Vander Donckt *v.* Thellusson, 8 Com. B. 812.

[6] See 1st ed. of this work, §§ 1044—1049.

[7] 17 & 18 Vict., c. 125. [8] See Reed *v.* King, 30 Law Times, 290, Ex.

designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."[1]

§ 1283. This enactment is extended, by § 103, to every court of civil judicature in England, and by §§ 25 & 98 of the Irish Common Law Procedure Act of 1856,[2] to "all courts of judicature, as well criminal as all others," in Ireland. It therefore applies to the Courts of Equity, and to examinations conducted by an examiner of those courts. Since the examiner, however, has no power to determine questions as to the relevancy or adverse nature of the evidence of a witness, or, in other respects, to act as a judge, he cannot himself give leave under the Act to produce counter evidence; but a special application for that purpose must be made to the Court;[3] and it seems that the leave cannot be given at the hearing, because no *new* witness can then be called.[4] When an examiner has reason to believe that a party will seek to avail himself of the statutory power of discrediting his own witness, he should take down the particular questions, as well as the answers upon which counter evidence may be required.[5]

§ 1284. As the enactment just cited is confined, in England, to

[1] This enactment is borrowed in great part from §§ 1845, 1848, of the New York Civ. Code, under which sections, "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present; and he must be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them." The Scotch law on this subject is defined by the Act of 15 & 16 Vict., c. 27, which in § 3 enacts, that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence, to prove that such witness has made such different statement on the occasion specified."

[2] 19 & 20 Vict., c. 102.

[3] Buckley *v.* Cooke, 1 Kay & J. 29, per Wood, V. C. [4] Id. [5] Id.

Courts of *civil* judicature, it will be right to bear in mind that in *criminal* trials, if a witness, on being examined for the Crown, gives an answer different to what was expected, his deposition before the justices, or the coroner, may be shown to him for the purpose of refreshing his memory, and the question may then be repeated even in a leading form; but if the witness persists in giving the same answer, the counsel for the prosecution will not, as it seems, be allowed to contradict his present testimony by putting in his former deposition.[1]

§ 1285.[2] When a witness has been called by one party, the other party, as soon as the examination in chief is closed, has a right to *cross-examine* him. The[3] exercise of this right is justly regarded as one of the most efficacious tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanor, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended.[4]

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[1] R. *v.* Williams, 6 Cox, C. C. 343, per Williams, J.; 2 Russ. C. & M. 897.

[2] Gr. Ev., § 445, as to first two lines.

[3] Gr. Ev., § 446, almost verbatim.

[4] 1 St. Ev. 186. On the subject of examining and cross-examining witnesses vivâ voce, Quintilian gives the following instructions:—"Primum est, nôsse testem. Nam timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens vero et constans, vel tanquam inimicus et pervicax dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insectantem pugnâssent, modestiâ mitigantur. Omnis autem interrogatio, *aut in causâ est, aut extra causam. In causâ*

§ 1286.[1] Such being the importance which is properly attached to the right of cross-examination, it is not surprising that

(sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. * * *Extra causam* quoque multa, quæ prosint, rogari solent, de vitâ testium aliorum, de suâ quisque, si turpitudo, si humilitas, si amicitia accusatoris, si inimicitiæ cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta;* qui multa contra patronos venuste testis sæpe respondet, eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. 5, c. 7. Mr. Alison's observations on the same subject are also interesting both to the student and the practitioner. He observes,—"It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped

[1] Gr. Ev., § 445, in part.

questions should occasionally arise, as to whether the witness has been so called by the one party as to entitle the other party to exercise this right. And here it is clear, that if the witness be called under a subpœna duces tecum, merely for the *purpose of producing a document*, which either requires no proof, or is to be identified by another witness, he need not be sworn, and if unsworn, he cannot be cross-examined.[1] So, if a witness be sworn under a mistake, whether on the part of counsel or of the officer of the court, and that mistake be discovered before the examination in chief has substantially begun, no cross-examination will be allowed.[2] Neither has the adverse party any right to cross-examine a witness, whose examination in chief has been stopped by the judge, after his having answered a merely immaterial question.[3] But on the other hand, it is by no means necessary that the witness should have been actually examined in chief; for if he has been intentionally called and sworn, and is moreover a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question.[4] Where witnesses are

the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel, through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." Alison's Pract. 546, 547. See also the remarks of Mr. Evans on Cross-examination, in his Appendix to Poth. on Obl. No. 16, Vol. 2, pp. 233, 234.

[1] Summers *v.* Moseley, 2 Cr. & M. 477; 4 Tyr. 158, S. C.; Perry *v.* Gibson, 1 A. & E. 48; 3 N. & M. 462, S. C.; Rush *v.* Smith, 1 C. M. & R. 94; Davis *v.* Dale, M. & M. 514; 4 C. & P. 335, S. C.; R. *v.* Murlis, M. & M. 515; Simpson *v.* Smith, 2 Ph. Ev. 397; Griffith *v.* Ricketts, 7 Hare, 300.

[2] Wood *v.* Mackinson, 2 M. & Rob. 273, per Coleridge, J.; Clifford *v.* Hunter, 3 C. & P. 16, per Lord Tenterden; Rush *v.* Smith, 1 C. M. & R. 94; Reed *v.* James, 1 Stark. R. 132, per Lord Ellenborough.

[3] Creevy *v.* Carr, 7 C. & P. 64, per Gurney, B.

[4] R. *v.* Brooke, 2 Stark. R. 472, per Lord Tenterden; Phillips *v.* Eames, 1 Esp. 357, per Lord Kenyon; Reed *v.* James, 1 Stark. R. 132; Wood *v.* Mackinson, 2 M. & Rob. 275, 276. The same rule prevails in the Ecclesiastical Courts; Newton *v.* Ricketts, 6 Ec. & Mar. Cas. 35.

simply called to speak to the character of a prisoner, it is not usual to cross-examine them, excepting under special circumstances;[1] but no rule of law expressly forbids this course.

§ 1287. In criminal cases, although the prosecutor is not *bound* to call every witness whose name is indorsed on the indictment,[2] he *usually* does so; and even if he declines to call any such witness, he should at least have him in court, so that he may be called for the defence, if wanted for that purpose.[3] The judge, too, in his discretion, will sometimes call any witnesses that have been omitted, in order to give the prisoner's counsel an opportunity to cross-examine them.[4] This rule applies to misdemeanors as well as to felonies,[5] and includes every witness who has been sworn with the view of going before the grand jury, though he may not have been actually examined by that body.[6] Indeed, in serious cases, the Court will sometimes, for the furtherance of justice, direct persons to be called as witnesses, though their names do not appear on the back of the indictment, provided there is reason to believe that they are acquainted with the circumstances of the case, and are consequently capable of giving material evidence.[7] Where a witness is thus called at the instance of the prisoner, and no question is put to him on behalf of the prosecution, he becomes the prisoner's witness,[8] and the prisoner's counsel, though still permitted to put questions in the nature of a cross-examination, cannot call witnesses to contradict his statement.[9] Neither, in such a case, can the counsel for the prosecution ask any question on re-examination, which does not

[1] R. *v.* Hodgkiss, 7 C. & P. 298, per Alderson, B.

[2] R. *v.* Woodhead, 2 C. & Kir. 520, by all the judges; R. *v.* Flatley, Ir. Cir. R. 445, per Pennefather, B.

[3] R. *v.* Woodhead, 2 C. & Kir. 520.

[4] R. *v.* Simmonds, 1 C. & P. 84, per Hullock, B.; R. *v.* Whitbread, id. n.; R. *v.* Taylor, id. n.; R. *v.* Beezley, 4 C. & P. 220; R. *v.* Bull, 9 C. & P. 22.

[5] R. *v.* Vincent, 9 C. & P. 91, per Alderson, B.

[6] R. *v.* Bodle, 6 C. & P. 186, per Gaselee, J., and Vaughan, B.

[7] R. *v.* Holden, 8 C. & P. 609, 610, per Patteson, J. See also R. *v.* Chapman, 8 C. & P. 558, and R. *v.* Orchard, id. 559, n.; R. *v.* Stroner, 1 C. & Kir. 650, per Pollock, C. B.

[8] R. *v.* Woodhead, 2 C. & Kir. 520.

[9] R. *v.* Bodle, 6 C. & P. 187, per Gaselee, J.

arise out of the cross-examination;[1] and perhaps if he has refused to call the witness, he will not be allowed to re-examine him at all.[2] When two or more prisoners are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them.[3] The counsel, too, for the other prisoners are entitled in such a case to reply upon his evidence.[4]

§ 1288. With respect to the *mode* of conducting a cross-examination, it is admitted on all hands, that *leading questions may* in general *be asked;*[5] but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness, which he is to echo back again;[6] neither does it sanction the putting of a question, which assumes that facts have been proved, which have not been proved, or that particular answers have been given contrary to the fact.[7] The rule ought also to receive some further qualification, where the witness is evidently hostile to the party calling him; for although it appears in one case to have been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not,[8] some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head; for a fraudulent witness might purposely conceal his bias in favour of one party,

[1] R. v. Beezley, 4 C. & P. 220, per Littledale, J.

[2] R. v. Harris, 7 C. & P. 581.

[3] R. v. Burdett, 1 Pear. & Dears. C. C. 431; 6 Cox, C. C. 458, S. C. So, in Lord v. Colvin, 3 Drew. 222, it was held by Kindersley, V. C., after consulting all the equity judges, that before an examiner in chancery, one defendant may cross-examine another defendant's witness.

[4] R. v. Burdett, 1 Pear. & Dears. 431; 6 Cox, C. C. 458, S. C.

[5] In Scotland leading questions used not to be allowed in the cross-examination, any more than in the examination in chief; Burnett, Cr. Law, c. 18, p. 465; 24 How. St. Tr. 660, n. But the modern practice of the Scottish Courts on this point is similar to our own, 2 Dickson Ev. 988.

[6] R. v. Hardy, 24 How. St. Tr. 659, 755.

[7] Hill v. Coombe, and Handley v. Ward, per Abbott, C. J., cited 1 St. Ev. 188, note *n*. [8] Parkin v. Moon, 7 C. & P. 409, per Alderson, B.

and thus induce the other to call him; or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust; and the more so in criminal cases, because there the prosecutor, who originally called the witness, would often have no opportunity of pointing out to the jury the unsatisfactory nature of his testimony.[1] In accordance with these views, it has been determined in America, that a judge, in his discretion, may prohibit leading questions from being put to an adversary's witness, who shows a strong interest or bias in favour of the cross-examining party, and needs only an intimation to say whatever is most favourable to his cause.[2]

§ 1289. On one point connected with the subject of cross-examination, the American practice differs widely from that which obtains in this country. Here, and in Ireland, the cross-examination, whether conducted in a Court of Law or a Court of Equity,[3] is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case;[4] and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. So far has this doctrine been carried, that, even where it was requisite that the substantial, though not the nominal, party in the cause

[1] This special evil could scarcely arise at Nisi Prius, as the counsel who opens the case on either side, is now entitled to sum up the evidence. See 17 & 18 Vict., c. 125, § 18, extended to Ireland by 19 & 20 Vict., c. 102, § 21. See also Hodges *v.* Ancrum, 11 Ex. R. 214.

[2] Moody *v.* Rowell, 17 Pick. 498.

[3] Berwick-upon-Tweed, Mayor & Corp. of, *v.* Murray, 19 L. J., Ch., 281, 286.

[4] So by the Scotch statute law, it is now enacted, that "in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party, against whom a witness is produced and sworn *in causâ*, to examine such witness, not in cross only, but *in causâ*," 3 & 4 Vict., c. 59, § 4.

should be called by his adversary, for the sake of formal proof only, it was held, that he was thereby made a witness for all purposes, and might be cross-examined to the whole case.[1] In America, however, the Supreme Court has determined that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his direct examination; and that, if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him, as such, in the subsequent progress of the cause.[2]

§ 1290.[3] Whether, when a party is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if he afterwards *recalls* the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle on which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that, in common fairness, each party should alternately have the right of cross-examining such a witness as to his adversary's case; while both should be precluded, in the course of the respective examinations in chief, from putting leading questions with regard to their own.[4] Accordingly, it has been held in Ireland, that a plaintiff may cross-examine any of his own witnesses, on their being afterwards called on behalf of the defendant.[5] In one English case,[6] however, Lord Kenyon is reported to have ruled,

[1] Morgan *v.* Brydges, 2 Stark. R. 314, per Abbott, J.; R. *v.* Murphy, 1 Arm. Mac. & Og. 206, per Pennefather, C. J.

[2] Philadelphia and Trenton Rail. Co. *v.* Simpson, 14 Peters. R. 448, 461. See also Harrison *v.* Rowan, 3 Wash. 580; Ellmaker *v.* Buckley, 16 Serg. & R. 77; Contrà, Moody *v.* Rowell, 17 Pick. 490, 498.

[3] Gr. Ev., § 447, as to first nine lines.

[4] 1 St. Ev. 187; 2 Ph. Ev. 401.

[5] Malone *v.* Spillessy, Ir. Cir. R. 504, per Lefroy, B. S. P., ruled in Lord *v.* Colvin, 3 Drew, 222, per Kindersley, V. C.

[6] Dickinson *v.* Shee, 4 Esp. 67.

that a plaintiff's witness, who was recalled by the defendant to establish a plea of tender, might have leading questions put to him as in an ordinary cross-examination; but the soundness of this decision, if cited in support of a general rule, may be doubted.

§ 1291.[1] The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute,[2] is not usually applied in cross-examinations with the same strictness as in examinations in chief; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will undertake to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put.[3] On this head it is difficult to lay down, or rather to apply, any precise general rule.[4] Still, one or two subsidiary rules have been clearly established, and a due attention to these will enable the practitioner to define with tolerable certainty the limits, within which questions on cross-examination must be confined.

§ 1292. First, no question respecting any fact *irrelevant to the issue* can be put to a witness on cross-examination for the mere purpose of *impeaching* his *credit* by contradicting him; and if any such question be inadvertently put and answered, the *answer* of the witness will be *conclusive.* For instance, it was held prior to the repeal of the usury laws,[5] that in a penal action for usury, alleged to have been committed in a contract made by the defendant with a witness who was called to establish the offence, the defendant's counsel could not cross-examine this witness as to other contracts made by him with other persons about the same time, in order to draw an inference that the contracts were all of the same nature, if the witness stated that the latter were not usurious, and to contradict him by extrinsic proof, if he said that they were.[6]

[1] Gr. Ev., § 449, in part.
[2] Ante, § 298, et seq.
[3] Haigh *v.* Belcher, 7 C. & P. 389, per Coleridge, J.
[4] Lawrence *v.* Baker, 5 Wend. 305.
[5] By 17 & 18 Vict., c. 90.
[6] Spenceley *v.* De Willott, 7 East, 108.

Again, on the trial of an issue, whether the defendant's manufactory emitted smoke prejudicial to the plaintiff's garden, where both parties had examined witnesses as to the effect of the works on neighbouring grounds, a witness was called by the defendant, who described several gardens in the neighbourhood as uninjured. In cross-examination, he was asked whether he knew Glasgow field, and having answered that he did, but that "he never knew of any damage done there," the counsel for the plaintiff proposed to ask him "Whether he had known of any sum having been paid by the defendant to the proprietors of Glasgow field, for alleged damage occasioned by the works?" The learned judge, however, refused to allow the question to be put, and on a bill of exceptions, the House of Lords confirmed the ruling.[1] Here, had the answer been in the affirmative, it would not have been evidence, because money paid to quiet a complaint can be no proof that the demand was well founded; and even if it were evidence in favour of the party receiving the money, it could not be evidence on behalf of a stranger. Neither was the question admissible in order to test the credit of the witness; for, raising, as it did, an irrelevant inquiry, the answer could not have been contradicted, had it been in the negative.

§ 1293. Next, with the view of *impeaching* the *character* of a witness, he may always be asked on cross-examination,[2] though, as we shall presently see, he is not always compelled to answer,[3] questions with regard to alleged *crimes* or other improper conduct on his part; and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence although denied by the witness; but if it be irrelevant, the answer of the witness, if he makes any, must be regarded as conclusive; and whether he

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[1] Tennant *v.* Hamilton, 7 Cl. & Fin. 122.

[2] Harris *v.* Tippett, 2 Camp. 638, per Lawrence, J.; R. *v.* Yewin, id. 639, per id.; R. *v.* Edwards, 4 T. R. 440; R. *v.* Barnard and R. *v.* James, cited in note, 1 C. & P. 86, 87; R. *v.* Watson, 2 Stark. R. 149; 32 How. St. Tr. 292 et seq., S. C. The cases of R. *v.* Lewis, 4 Esp. 225; Macbride *v.* Macbride, id. 242; and R. *v.* Pitcher, 1 C. & P. 85, where questions tending to degrade the witness were not allowed to be put, cannot now be regarded as authorities.

[3] Post, § 1308 et seq.

answers or not, no independent proof can be given to establish the truth of the imputation.[1]

§ 1294. An exception[2] to this last rule has recently been recognised by the Legislature, and the Common Law Procedure Act of 1854[3] enacts, in § 25, that "a witness in any cause may be questioned as to whether he has been *convicted* of any *felony* or *misdemeanor*, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."[4]

§ 1295. Thirdly, with respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down, that if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot. It becomes, then, necessary to ascertain what matters connected with the witness are or are not *relevant;* and here, in addition to what has been stated in a

[1] R. *v.* Watson, 2 Stark. R. 149; 32 How. St. Tr. 486—495, S. C.; R. *v.* Rudge, Pea. Add. Cas. 232, per Lawrence, J.; Goddard *v.* Parr, 24 L. J., Ch., 783, per Kindersley, V. C.

[2] See the reasons for this exception as stated by the Common Law Comnisioners, in their 2nd Rep. pp. 21, 22.

[3] 17 & 18 Vict., c. 125.

[4] This enactment is extended, by § 103, to "every Court of *Civil* Judicature in England," and by §§ 28 & 98 of 19 & 20 Vict., c. 102, Ir., "to all Courts of Judicature, as well criminal as all others, in Ireland." In New York, "a witness must answer as to the fact of his previous *conviction* for felony." See Civil Code, § 1854.

former chapter,[1] it should be observed, that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not connected with the cause or the parties. Therefore, if a witness be questioned on cross-examination respecting the commission of crimes by him on some former occasion, his answers, except in the case of an actual conviction, must be taken as conclusive.[2] This rule is founded on two reasons; first, that a witness cannot be expected to come prepared to defend all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues.[3] The rejection of the contradictory testimony may indeed sometimes exclude the truth; but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail.[4] The case of Alcock *v.* The Royal Exchange Insurance Company[5] forms no real exception to the above rule. There, an action was brought by a shipowner against underwriters on a policy of insurance, and the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness for the plaintiff, and, on cross-examination, denied that previous to the voyage insured against he had been an habitual drunkard. The defendants, thereupon, called witnesses to establish that fact, and the Court held that their evidence was clearly admissible, as tending to show that the captain was not likely to have exercised a sound judgment in reference to the abandonment, and that consequently the judgment actually exercised by him was not entitled to any respect from the jury.

§ 1296. Whether questions respecting the *motives, interest, or conduct* of the witness, as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities differ. On the one hand, it has been held relevant to

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[1] Ante, § 314, et seq. [2] Goddard *v.* Parr, 24 L. J., Ch., 784.
[3] Att.-Gen. *v.* Hitchcock, 1 Ex. R. 93, 94, per [illegible] B., 103, 104, per Alderson, B. [4] Id. 105, per Rolfe, B.
[5] 13 Q. B. 292.

the guilt or innocence of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner;[1] and the like inquiry has been made in a civil action.[2] So also, in an action upon a promissory note, the execution of which was disputed, it was held material to ask the subscribing witness, whether she was not the plaintiff's kept mistress.[3] In all these cases, the witness under cross-examination denied the fact imputed, and was exposed to contradiction by other witnesses. So, in modern times, it has frequently been held, that in actions for seduction, and on indictments for rape, the principal female witness might be cross-examined, with the view of showing that she had previously been guilty of incontinence with the defendant, or even with other men, or with some particular person named; and when she has denied the facts imputed, witnesses have been called for the purpose of contradiction.[4] So, on the trial of Lord Stafford for high treason, his lordship was allowed to adduce proof that one of the witnesses for the prosecution had attempted to suborn several persons to give false evidence against him;[5] and in the Queen's case, the judges appear to have considered such a course unobjectionable, provided the witness were first cross-examined upon the subject.[6]

§ 1297. On the other hand, it is said to have been several times ruled of late years, that, if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be

[1] R. *v.* Yewin, 2 Camp. 638, per Lawrence, J.

[2] Attwood *v.* Welton, 7 Conn. 66.

[3] Thomas *v.* David, 7 C. & P. 350, per Coleridge, J.

[4] R. *v.* Robins, 2 M. & Rob. 512, per Coleridge and Erskine, Js.; Verry *v.* Watkins, 7 C. & P. 308, per Alderson, B.; Andrews *v.* Askey, 8 C. & P. 7, per Tindal, C. J.; Grinnell *v.* Wells, cited 2 Russ. C. & M. 784, note *y*, per Erskine, J.; R. *v.* Aspinall, 3 St. Ev. 952, per Hullock, B.; R. *v.* Martin, 6 C. & P. 562, per Williams, J.; R. *v.* Barker, 3 C. & P. 589, per Park and Parke, Js. These cases appear to overrule R. *v.* Hodgson, R. & R. 211; Dodd *v.* Norris, 3 Camp. 519; and a dictum in R. *v.* Clarke, 2 Stark. R. 244, per Holroyd, J. See ante, § 336.

[5] 7 How. St. Tr. 1400.

[6] 2 B. & B. 311. Recognised by Parke, B., in Att.-Gen. *v.* Hitchcock, 1 Ex. R. 94.

received.[1] So, where a witness called to character, denied having ever said that the prisoner should be acquitted if it cost him 20*l.*, the Court decided that the counsel for the prosecution must rest satisfied with the answer;[2] and in a civil action, where the defendants sought to disparage the testimony of a witness of the plaintiff, by proving some circumstances indicating a hostile spirit towards themselves, the learned judge is reported to have held, that it could not be done.[3] Again, where the principal witness against a man indicted for theft was his apprentice, who, being asked in cross-examination whether he had not been charged with robbing his master, denied the fact, the prisoner's counsel was not allowed to prove that the answer was false.[4]

§ 1298. Such being the conflict of authorities, it is no easy matter to state the rule with precision; but if an opinion be hazarded, it must be pronounced in favour of the former, rather than of the latter class of cases. Indeed, this view of the law is strongly confirmed by a case in the Exchequer, where the learned Barons intimated a tolerably decisive opinion that a witness might be asked any *questions* tending to *impeach his impartiality*, and that his answers might be contradicted by other witnesses.[5] No doubt it is an object of great importance to confine the attention of the jury as much as possible to the specific issues; but it seems highly essential to the discovery of truth, that those who are to determine the respective value of conflicting testimony should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that a witness cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence that he has been guilty of a specific crime, *unconnected with the cause or parties*, should

[1] R. *v.* Lee, 2 Lew. C. C. 154, per Coleridge, J.; Harris *v.* Tippett, 2 Camp. 637, per Lawrence, J.

[2] R. *v.* Lee, 2 Lew. C. C. 154, per Coleridge, J.

[3] Harrison *v.* Gordon, 2 Lew. C. C. 156, per Alderson, B.

[4] R. *v.* Yewin, 2 Camp. 638, per Lawrence, J.

[5] Att.-Gen. *v.* Hitchcock, 1 Ex. R. 94, 100, 102.

not be adduced;—because, even were such a fact proved, it would raise, in the absence of interest, only a very faint presumption that he had been guilty of perjury;—but this argument should not be allowed to extend to a case where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would, almost of necessity, apply to some act of recent date, and as such might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem at the present day to be all the more necessary, as witnesses are no longer incompetent to testify on the ground of interest or crime.

§ 1299. Assuming, however, that a witness may in all cases be cross-examined, and, if necessary, contradicted, for the purpose of showing that his mind is not in a state of impartiality as between the two contending parties, it must clearly appear, before the contradictory evidence can be admitted, that the questions answered had a direct tendency to prove that the witness was under the influence of an undue bias. This doctrine was established by the case of the Attorney-General *v.* Hitchcock.[1] That was an information under the revenue laws, and a witness, who had given material evidence for the Crown, was asked on cross-examination, whether he had not *said* that the officers of the Crown had *offered* him 20*l.* to give that evidence. He denied that he had ever said so, and the Court held that evidence to contradict him was inadmissible. Nor can it be doubted but that this decision was correct; for as the mere offer of a bribe, if unaccepted, could not in fairness prejudice the character of the party to whom it was made, it was obviously immaterial what the witness might have said upon the subject. Had the witness been asked whether he had said that he had *received* a bribe, and had he denied that he had ever made such a statement, the decision might have been very different.

§ 1300. Again, it is certainly relevant to put to a witness any

[1] 1 Ex. R. 91. This case deserves an attentive perusal.

question, which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given on the trial of the issue; and if such question be put, and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason, that the contradiction would qualify or contradict the previous part of the witness's testimony, and so neutralise its effect.[1] In accordance with this general principle, a witness may be cross-examined as to a *former statement* made by him *relative to the subject-matter of the cause*, and inconsistent with his present testimony; and if he either denies, or does not distinctly admit, that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.[2] So, if the case be such as to render evidence of opinion admissible and material, as, for instance, if the witness has been examined as to his *belief* of the identity of a person, or of his handwriting, or of his sanity, or if he be a skilled witness called to state his opinion on a matter of science, he may be asked on cross-examination, whether he has not on some particular occasion expressed a different opinion upon the same subject; and if he deny the fact, it may be proved by other evidence. But[3] if a witness has simply testified to a fact, his previous *opinion* as to the *merits of the cause* cannot be regarded as relevant to the

[1] Att.-Gen. *v.* Hitchcock, 1 Ex. R. 102, per Alderson, B.

[2] See Angus *v.* Smith, M. & M. 473; Crowley *v.* Page, 7 C. & P. 789; Andrews *v.* Askey, 8 C. & P. 7; Magrath *v.* Browne, Arm. Mac. & Ogle, 133; The Queen's case, 2 B. & B. 313, 314; 2nd Rep. of Com. Law Commiss. 18, 19; 17 & 18 Vict., c. 125, § 23, which enacts that "if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." This enactment is extended to all Courts of Civil Judicature in England, by § 103, and to "all Courts of Judicature, as well criminal as all others," in Ireland; by 19 & 20 Vict., c. 102, §§ 26 & 98. It overrules Pain *v.* Beeston, 1 M. & Rob. 20; and Long *v.* Hitchcock, 9 C. & P. 619. [3] Gr. Ev., § 449, almost verbatim.

issue.[1] Therefore, in an action upon a marine policy, where the broker, who had effected the policy for the plaintiff, stated as a witness for the defendant that he had omitted to disclose a certain fact, now contended to be material to the risk, and on being cross-examined, as to whether he had not expressed his opinion that the defendant had not a leg to stand upon, denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected.[2]

§ 1301. When the contradictory statement alleged to have been made by the witness was contained in a letter or other *writing*, the rule, as laid down by the judges in the Queen's case,[3] was that the cross-examining counsel must produce the document as his evidence, and have it read, in order to found any questions to the witness upon it. This rule, however,—excluding, as it did, one of the best tests by which the memory and integrity of a witness can be tried,[4]—has recently been abrogated by the Legislature; and a witness examined in any court of civil judicature, in England, or in any court of judicature, whether civil or criminal, in Ireland, may now[5] "be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing having been shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." [6]

[1] Daniels v. Conrad, 4 Leigh's R. 401, 405.

[2] Elton v. Larkins, 5 C. & P. 385, 390, 391, per Tindal, C. J.

[3] 2 B. & B. 286—290, 292—294; Macdonnell v. Evans, 11 Com. B. 930.

[4] See per Lord Brougham, in Ed. Rev., vol. 69, p. 22; and Speech on Law Reform, vol. 2, Lord Brougham's Speeches, p. 447.

[5] See §§ 24 & 103 of the "Common Law Procedure Act, 1854," 17 & 18 Vict., c. 125, and §§ 27 & 98 of the "Common Law Procedure Amendment Act (Ireland), 1856," 19 & 20 Vict., c. 102.

[6] The reasons for this change in the law are ably stated by the Common

§ 1302.[1] If it should appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been *lost* or *destroyed*, the proviso just cited, empowering the judge to require its production, will of course become inoperative. In such a case, therefore, it is apprehended that the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains, as to whether the cross-examining party might first *interpose evidence out of his turn*, to prove the loss or destruction of the document, or to show that it was in the hands of the opponent, that he had had notice to produce it, and that he refused to do so; and might then cross-examine the witness as to its contents.[2] In former times this course was deemed irregular,[3] but modern authorities are not wanting to show that it would now be generally allowed. Thus, if the paper in question be not in the actual possession of the cross-examining party, he may, before commencing his cross-examination, or during its progress, direct any person, whom he has served with a subpœna duces tecum, to produce the writing,[4] or call upon the adversary to do so, if the paper is in his hands, and he has had notice to produce it.[5] The counsel for a prisoner has also been allowed to interpose proof of the loss of the original depositions, and of the correctness of a copy, and then to cross-examine the witness, the copy being first duly read.[6] In another case, a witness was permitted to be cross-examined upon an office copy of an affidavit made by her, the affidavit itself being filed, and the cross-examining counsel having put in an order to admit the document to be a true copy.[7] If[8] in any particular case, this

Law Commiss. in their 2nd Report, pp. 19—21. See also the 1st Ed. of this work, § 1057. [1] Gr. Ev., § 464, slightly as to first eight lines.

[2] See 1 St. Ev. 205, n. *d*.

[3] Graham *v*. Dyster, 2 Stark. R. 23, per Lord Ellenborough; Sideways *v*. Dyson, id. 49, per id.

[4] Att.-Gen. *v*. Bond, 9 C. & P. 189, per Lord Abinger.

[5] Calvert *v*. Flower, 7 C. & P. 386, per Lord Denman.

[6] R. *v*. Shellard, 9 C. & P. 279, per Patteson, J.

[7] Davies *v*. Davies, 9 C. & P. 252.

[8] Gr. Ev., § 464, in part as to four lines.

course of proceeding would be likely to occasion inconvenience, by disturbing the regular progress of the cause and distracting the attention, the judge would be empowered to postpone the examination as to this point to a later stage in the cause.[1]

§ 1303. Another point on which a doubt may be entertained respecting the true meaning of the proviso, is this. Let it be assumed that the object of the cross-examining counsel is to discredit a witness, by showing that he has previously told a different tale in some affidavit, deposition, or answer in Chancery, which has been duly filed of record. The question then will be, whether, in the event of the judge requiring "the production of the document for his inspection," it will be necessary that the *original* should be forthcoming, or whether an examined copy,—or if the document be filed in the same cause and court, an office copy,—will suffice. The doubt arises from the case of Bastard *v.* Smith,[2] in which Chief Justice Tindal is reported to have held at Nisi Prius, that a plaintiff's counsel had no right under the old law to cross-examine one of the defendant's witnesses on the contents of his own affidavit without putting the *original* into his hands to refresh his memory. The grounds for this decision are not stated in the report; and as the case is certainly opposed to a variety of decisions,[3] and, moreover, contravenes the very salutary rule, which protects from removal the records of courts of justice, it is submitted that little, if any, weight should be attached to it. When an examined copy is used, some difficulty may doubtless arise in identifying the witness with the person who swore to the truth of the original document, and in order to obviate this inconvenience, it may occasionally be prudent to produce the record itself;[4] but this is a very different matter from holding that the record *must* be produced.

§ 1304. As the enactment under discussion does not at present

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[1] 2 Ph. Ev. 439, 440.

[2] 10 A. & E. 214.

[3] Ewer *v.* Ambrose, 4 B. & C. 24; Highfield *v.* Peake, M. & M. 109; Davies *v.* Davies, 9 C. & P. 252, per Gurney, B.; Sainthill *v.* Bound, 4 Esp. 74; Garvin *v.* Carroll, 10 Ir. Law R. 323.

[4] See Garvin *v.* Carroll, 10 Ir. Law R. 330, per Crampton, J., while commenting on Rees *v.* Bowen, McClel. & Y. 383.

apply to courts of criminal jurisdiction, it would seem that the rules laid down by the judges, as to the *mode of cross-examining witnesses* for the Crown, *with respect to what they have previously sworn before the magistrate*, are still in force. The rules in question are as follows:—

"1. Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

"2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

"3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination:[1] and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."[2]

§ 1305. In accordance with these rules,—which, although in terms

[1] R. v. Curtis, 2 C. & Kir. 763.

[2] 7 C. & P. 676.

confined to depositions taken before a magistrate, are equally applicable to those which are returned by a coroner,[1]—it has been held that a witness for the prosecution cannot be directed by the prisoner's counsel to look at his deposition and then say whether he still adheres to the statement he has just made, but the deposition must be first read as evidence for the prisoner, and the witness may afterwards be cross-examined respecting its contents.[2] Neither can a witness for the Crown be asked generally, on cross-examination, whether he has always told the same story, but the question must be qualified by adding, "except when you were before the magistrates or coroner."[3] The rules, however, are confined to those cases in which the depositions have been duly taken and returned, and when, consequently, they would furnish the best evidence of what took place at the prior examination.[4] Neither do they protect a witness from cross-examination as to what he said prior to his giving his testimony before the magistrate in the presence of the prisoner, although his words may have been taken down officiously by the magistrate's clerk, and may have been afterwards verified on oath by himself when examined by the justice, so that they actually appear in the deposition as formally returned.[5] It seems, too, that the rules are merely intended to check the license of the bar, and are not binding on the judges themselves, who have still a discretionary power of questioning the witness as to any discrepancy between his evidence in court and his former statement, without first putting in the depositions; but it may be questionable whether, in such a case, if new facts were introduced in evidence, the counsel for the prosecution would not be entitled to reply.[6]

§ 1306. The rule which requires the attention of the witness to

[1] R. *v.* Barnet, 4 Cox, C. C. 269. There Platt, B., appears to have allowed the witness to refresh his memory with the deposition, but this was obviously a mistake. See cases cited in next note.

[2] R. *v.* Ford, 2 Den. C. C. 245; 2 C. & Kir. 113; 5 Cox, C. C. 184, S. C.; R. *v.* Palmer, 5 Cox, C. C. 236; R. *v.* Stokes, 4 Cox, C. C. 451.

[3] R. *v.* Holden, 8 C. & P. 609, per Patteson, J.; R. *v.* Shellard, 9 id. 280, per id. See R. *v.* Price, 7 Cox, C. C. 405.

[4] R. *v.* Griffiths, 9 C. & P. 746, per Coleridge, J., and Gurney, B.

[5] R. *v.* Christopher, 4 Cox, C. C. 76; 1 Den. 536; 2 C. & Kir. 994, S. C.

[6] R. *v.* Edwards, 8 C. & P. 26.

be specially drawn to the circumstances in respect of which it is proposed to impeach his credit by independent evidence, is not confined to the case where the witness is alleged to have made contradictory statements, but it extends alike to all cases where declarations made by a witness, or acts done by him, are tendered in evidence with the view either of contradicting his testimony in chief, or of proving that he is a corrupt witness, or that he has been guilty of attempting to corrupt others.[1] "I like the broad rule," said Mr. Justice Patteson on one occasion, "that when you mean to give evidence of a witness's declarations *for any purpose*, you should ask him whether he ever used such expressions."[2] The case which called forth these observations was an action for seduction, and the Court seems to have considered, though the point was not decided, that for the purpose of reducing the damages, the defendant, without first cross-examining the principal female witness, might call persons to specify particular language of an indecent and unbecoming character as used by her; but it is submitted that in strictness this course could not be pursued, but that the defendant in such a case should be restricted to general evidence of lightness of conduct.

§ 1307. Questions not unfrequently arise at Nisi Prius as to whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting; but the practice seems to be as follows:—If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity,[3] or respecting the character of the handwriting,[4] his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness,[5]

[1] The Queen's case, 2 B. & B. 311.
[2] Carpenter v. Wall, 11 A. & E. 804.
[3] Collier v. Nokes, 2 C. & Kir. 1012, per Wilde, C. J.
[4] Cope v. Thames Haven Dock Co., 2 C. & Kir. 757, per Erle, J.; Sinclair v. Stevenson, 1 C. & P. 583, per Best, C. J.; Russell v. Rider, 6 C. & P. 416, per Bosanquet, J.
[5] Ante, § 1270.

or if any questions be put respecting its contents,[1] a sight of the document may then be demanded by the opposite counsel.

§ 1308. It has already been casually observed, that some questions a witness is *not compellable to answer*. First, this is the case, where the answers would have a *tendency* to expose the witness,[2] or, as it seems, the husband or wife of the witness,[3] to any kind of *criminal charge*, whether in the common-law or ecclesiastical[4] Courts, or to a *penalty* or *forfeiture* of any nature whatsoever.[5] This rule, which is of great antiquity, and was even recognised by Chief Justice Jefferies, when it told *against* the prisoner,[6] is not confined to courts of law, but is also administered in Chancery, where a defendant will not be compelled to discover that, which, if answered, would tend to subject him to any punishment,[7] penalty,[8] forfeiture,[9] or ecclesiastical censure,[10] however material the answer may be to the plaintiff's case.[11] Neither will a witness in Equity

[1] Cope *v.* Thames Haven Dock Co., 2 C. & Kir. 757.

[2] R. *v.* Garbett, 1 Den. C. C. 236; 2 C. & Kir. 474, S. C.

[3] Cartwright *v.* Green, 8 Ves. 405; R. *v.* All Saints, Worcester, 6 M. & Sel. 200, per Bayley, J.; ante, § 1234.

[4] Parkhurst *v.* Lowten, 1 Mer. 391; 2 Swanst. 215, S. C., as to simony; Brownsword *v.* Edwards, 2 Ves. sen. 245, as to incest; Chetwynd *v.* Lindon, id. 450, and Finch *v.* Finch, id. 493, as to concubinage.

[5] R. *v.* Friend, 13 How. St. Tr. 16—18; R. *v.* Lord G. Gordon, 2 Doug. 593; 21 How. St. Tr. 650, S. C.; R. *v.* Lord Macclesfield, 16 How. St. Tr. 1146—1150; R. *v.* Slaney, 5 C. & P. 213, per Lord Tenterden; R. *v.* Pegler, id. 521, per Littledale and Park, Js.; Maloney *v.* Bartley, 3 Camp. 210, per Wood, B.; Dandridge *v.* Corden, 3 C. & P. 11, per Lord Tenterden. See Chester *v.* Wortley, 17 Com. B. 410.

[6] R. *v.* Rosewell, 13 How. St. Tr. 169.

[7] Macallum *v.* Turton, 2 You. & Jer. 183; Paxton *v.* Douglas, 19 Ves. 225; Thorpe *v.* Macaulay, 5 Madd. 229, 231, n. *s*; Claridge *v.* Hoare, 14 Ves. 59, 65; McIntyre *v.* Mancius, 16 Johns. 592.

[8] See cases cited in last note.

[9] Parkhurst *v.* Lowten, 1 Mer. 401, 402; Lord Uxbridge *v.* Staveland, 1 Ves. sen. 56. In Att.-Gen. *v.* Duplessis, the House of Lords held that the legal disability of an alien to hold lands was neither a penalty nor forfeiture, 1 Brown, P. C. 415; 2 Ves. sen. 287, S. C. See now 7 & 8 Vict., c. 66. As to the distinction between a forfeiture and a conditional limitation respecting which no protection is allowed, see Hambrook *v.* Smith, 17 Sim. 209, 216—218.

[10] See cases cited ante, n. 4.

[11] Wigram on Discovery, pp. 80, 81, 192, 193, and cases there cited;

be forced to answer interrogatories of a like tendency.[1] The same doctrine prevails in the Spiritual Courts,[2] and is part and parcel of the law of Scotland.[3] Some of the older decisions on this subject are calculated to make us feel the advantage of living at a time when freedom of conscience is at length fully established.[4] Thus in the reign of William the Third, and again so late as the year 1781, we find witnesses protected from answering the simple question whether they were protestants or papists.[5]

§ 1309. Other cases, again, amply justify a doubt, as to whether the protection has not been carried very far beyond its legitimate bounds.[6] Thus, in an action for a libel, contained in a voluntary affidavit, which the defendant had sworn extra-judicially before a magistrate, the Court held that the magistrate's clerk was not bound to answer, whether he wrote the affidavit by the defendant's orders, and delivered it to the magistrate; and it has recently been decided in Ireland, that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, might refuse to answer any question relating thereto.[8] It is not here intended to insinuate, that these cases are wrong decisions; for numerous authorities might be cited, which clearly establish, that if the fact to which the witness is interrogated, forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or

Story, Eq. Pl. §§ 524, 576, 577, 592—598. See Chadwick *v.* Chadwick, 22 L. J., Ch., 329, per Turner, V.-C. [1] Paxton *v.* Douglas, 16 Ves. 239.

[2] Swift *v.* Swift, 4 Hagg. Ecc. R. 154; King *v.* King, 2 Roberts. Ec. R. 153. [3] Alison, Pr. Cr. Law, 527.

[4] See 7 & 8 Vict., c. 102; and 9 & 10 Vict., c. 59.

[5] R. *v.* Friend, 13 How. St. Tr. 16—18; R. *v.* Lord G. Gordon, 21 id. 650; 2 Doug. 593, S. C.

[6] In New York the protection is far more limited than in England. See Civil Code, § 1854, which enacts that a witness "need not give an answer, which will have a tendency to subject him to punishment for a *felony.*" This seems to be the sound rule.

[7] Malony *v.* Bartley, 3 Camp. 210, per Wood, B.

[8] R. *v.* Handcock, Ir. Cir. R. 329, per Brady, C. B. For other instances of injustice occasioned by the stringency of this rule, see Brownsword *v.* Edwards, 2 Ves. Sen. 245; Sharp *v.* Carter, 3 P. Wms. 375; Claridge *v.* Hoare, 14 Ves. 59. See also some very sensible observations on this subject in the Law Rev., No. xiii., pp. 19—30.

misdemeanor, or expose him to a penalty or forfeiture, he is not bound to answer;[1]—but it is suggested, that, where the question *is material to the issue*, it should be left to the discretion of the judge, whether or not he will enforce an answer, having due regard to the general interests of justice; provided always, that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates, or at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness.[2]

§ 1310. On several occasions, the Legislature has acted on this principle, and has either directly deprived the witness of the privilege, or, by an Act of indemnity, has rendered it valueless. Thus, all persons offending against the Act relating to the combination of workmen may be compelled to give evidence for the Crown, upon any information exhibited under that Act against any persons not being such witnesses; but in all such cases, the witness, after having given his evidence, is indemnified against any prosecution for having offended in the matter to which his testimony relates.[3] So, under the Act relating to embezzlements committed by agents, "No banker, merchant, broker, factor, attorney, or other agent, shall be liable to be convicted by *any evidence whatever* as an offender against that Act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such an act *on oath*, in consequence of any compulsory process of any court of law or equity, in any action, suit, or other proceeding, which shall have been bonâ fide instituted by any party aggrieved, or if he shall have disclosed the same in any examination or

[1] Cates *v.* Hardacre, 3 Taunt. 424; Macallum *v.* Turton, 2 You. & Jer. 183, 195; Parkhurst *v.* Lowten, 2 Swanst. 215; Paxton *v.* Douglas, 16 Ves. 242, and 19 Ves. 227, 228; Harrison *v.* Southcote, 1 Atk. 518; Swift *v.* Swift, 4 Hagg. Ecc. R. 154; King *v.* King, 2 Roberts. Ec. R. 153; The People *v.* Mather, 4 Wend. 229, 252—254; 1 Burr's Trial, 245; Southard *v.* Rexford, 6 Cowen, 254, 255; Bellinger *v.* The People, 8 Wend. 595.

[2] See Law Rev., No. xiii., pp. 28—30.

[3] 6 Geo. 4, c. 129, § 6.

deposition before any commissioners of bankrupt."[1] The Fraudulent Trustee Act of 1857 also contains a special enactment, that nothing therein "shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court of Equity, or in the Courts of Bankruptcy or Insolvency; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any proceeding under this Act."[2] Somewhat similar clauses are inserted in the Act for the more effectual prosecution of the keepers of gaming-houses,[3] and for inquiring into corrupt practices at elections for members of Parliament.[4] So, when Parliamentary inquiries are instituted respecting gaming, and other illegal transactions, where the testimony of many persons implicated is required, Acts of indemnity are occasionally passed, with the view of absolving from punishment or penalty any witness, who shall make a faithful discovery of what he knows in relation to the matters under investigation.[5]

§ 1311. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the Court will determine, under all the circumstances of the case, as soon as the protection is claimed; but without requiring the witness fully to explain how the effect would be produced; for if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated.[6] It appears to be still an undecided point, whether the mere declaration of a witness on oath, that he believes that the answer will tend to criminate him, will suffice to protect him from answering, when the other circumstances of the case are not such as to induce the judge to believe that the answer would in reality tend to criminate the witness.[7] However, as Lord Hardwicke once observed, "these

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1 7 & 8 Geo. 4, c. 29, § 52. See R. v. Strahan, 7 Cox, C. C. 85.
2 20 & 21 Vict., c. 54, § 11.
3 8 & 9 Vict., c. 109, § 9; 17 & 18 Vict., c. 38, §§ 5, 6.
4 15 & 16 Vict., c. 57, §§ 8, 9, 10; 17 & 18 Vict., c. 102, § 35.
5 See 5 & 6 Vict., c. 31; 7 & 8 Vict., c. 7; and 14 & 15 Vict., c. 106.
6 The People v. Mather, 4 Wend. 253, 254.
7 R. v. Garbett, 2 C. & Kir. 495; 1 Den. C. C. 258, S. C.; Fisher v.

objections to answering should be held to very strict rules;"[1] and, in some way or other, the Court should have the sanction of an oath for the facts on which the objection is founded.[2]

§ 1312. If the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time;[3] or if the offence has been pardoned,[4] or the penalty or forfeiture waived; or if, in any other way, the reason for the privilege has ceased, the privilege itself will cease also, and the witness will be bound to answer.[5] Moreover, a witness cannot object to answer a question on the ground that he is a foreigner, and that his answer will render him liable to be prosecuted in his own country.[6] This protection, too, has, fortunately for the interests of creditors, not been imported, at least in all its strictness, into the *bankrupt law;* and the bankrupt consequently cannot refuse to discover his estate and effects, and the particulars relating to them, though, by giving information on this subject, his answers may *tend to show* that he has been guilty of fraudulent concealment, or of some other offence against the bankrupt law, or that he owns property, which he has obtained illegally, or the possession of which will render him liable to penalties.[7]

Ronalds, 12 Com. B. 762. In this last case, Jervis, C. J., and Maule, J., intimated an opinion that the witness might determine for himself whether or not his answer would have a tendency to criminate him; sed qu., and see Osborn *v.* London Dock Co., 10 Ex. R. 701, per Parke, B.

[1] Vaillant *v.* Dodemead, 2 Atk. 524.

[2] Parkhurst *v.* Lowten, 2 Swanst. 203, per Lord Eldon. See post, §§ 1319, 1320.

[3] Roberts *v.* Allatt, M. & M. 192, per Lord Tenterden; Parkhurst *v.* Lowten, 1 Mer. 400, per Lord Eldon; The People *v.* Mather, 4 Wend. 229, 252—255; Williams *v.* Farrington, 2 Cox, 202; Davis *v.* Reid, 5 Sim. 443.

[4] In two old cases, R. *v.* Reading, 7 How. St. Tr. 296, and R. *v.* Shaftesbury, 8 id. 817, a contrary rule seems to have been laid down; but the authority of these decisions is very questionable. See M. & M. 193, note.

[5] Wigram on Discovery, pp. 83, 84, and cases there cited.

[6] King of the Two Sicilies *v.* Willcox, 1 Sim. N. S. 301, 329—331, per Lord Cranworth.

[7] R. *v.* Scott, 25 L. J., M. C., 128; Ex parte Cossens, re Worrall, Buck, 531, 540, per Lord Eldon; 12 & 13 Vict., c. 106, §§ 117, 260; 20 & 21 Vict., c. 60, §§ 306, 385, Ir.; ante, § 822.

§ 1313. Secondly, it has been much debated, whether a witness is bound to answer any question, the *direct and immediate effect of answering which might be to degrade his character.* On this subject the law still remains in a somewhat unsettled state: but thus much would seem to be clear; viz., that where the transaction, to which the witness is interrogated, forms *any material part of the issue,* he will be obliged to give evidence, however strongly it may reflect on his conduct.[1] Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony might be necessary for the protection of the property, the liberty, or the life of a fellow-subject, or might at least be required for the due administration of public justice. Were such a rule of protection to prevail, a man who had been convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

§ 1314. Where, however, the question is *not directly material* to the issue, but is only put for the purpose of testing the *character,* and consequent *credit,* of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show that in such case the witness is not bound to answer;[2] but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times.[3] Even Lord Ellenborough, who is reported to have held on one occasion,[4] that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that

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[1] See ante, §§ 1293, 1296.

[2] R. *v.* Cook, 13 How. St. Tr. 334, 335, per Treby, C. J.; R. *v.* Friend, id. 17, per id.; R. *v.* Layer, 16 id. 161, per Pratt, C. J.; R. *v.* O'Coigly, 26 id. 1351—1353; Macbride *v.* Macbride, 4 Esp. 242, per Lord Alvanley; Dodd *v.* Norris, 3 Camp. 519; R. *v.* Hodgson, R. & R. 211.

[3] Parkhurst *v.* Lowten, 1 Mer. 400, per Lord Eldon; 2 Swanst. 216, S. C.; Cundell *v.* Pratt, M. & M. 108, per Best, C. J.; Roberts *v.* Allatt, id. 192, per Lord Tenterden; R. *v.* Edwards, 4 T. R. 440. See also cases cited ante, pp. 1161, n. 2, and 1164, n. 4.

[4] Millman *v.* Tucker, Pea. Add. Cas. 222.

the question could not so much as be put to him,[1] seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his lordship harshly observed, "If you do not answer the question, I will send you there."[2] No doubt cases may arise, where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a *remote date*, might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

§ 1315. But the rule of protection should not be further extended; for, if the inquiry relates to *transactions* comparatively *recent*, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation;[3] but on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause.[4]

§ 1316. However the law may be ultimately determined on the point just discussed, it seems to be generally conceded, that

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[1] R. *v.* Lewis, 4 Esp. 226.
[2] Frost *v.* Holloway, cited 1 St. Ev. 197, note *n*; and 2 Ph. Ev. 428.
[3] 1 St. Ev. 193.
[4] Id.

where the answer, which the witness may give, will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may be compelled to reply either at law or in equity.[1] With respect, however, to questions which have a tendency to degrade the witness, as involving the fact of his previous bankruptcy or insolvency, it seems that an objection may be taken on the ground that such a fact can only in strictness be proved by the production of the record;[2] for although the parol admissions of *parties* are now receivable in evidence, notwithstanding they relate to the contents of deeds or records,[3] witnesses cannot be forced in a court of law to make any such admissions. Still, in practice it cannot be denied that questions of this nature are very frequently allowed to be put, and where the object is to discredit a witness, he is constantly asked in cross-examination whether he has not been a bankrupt, or has taken the benefit of the Insolvent Debtors' Act.[4]

§ 1317.[5] At one time it was considered doubtful, whether a witness could be compelled to answer, where by so doing he would *subject himself to a civil action or pecuniary loss*, or *charge himself with a debt*. This question was much discussed in Lord Melville's case; and being finally submitted to the judges, eight of them, with the Chancellor and Lord Eldon, were of opinion that a witness in such case was bound to answer, while four thought that he was not.[6] To remove the doubts, which such a diversity of opinion threw over the subject, a statute was passed,[7]

[1] Macbride *v.* Macbride, 4 Esp. 242, per Lord Alvanley; Parkhurst *v.* Lowten, 1 Mer. 400, per Lord Eldon; 2 Swanst. 194, 216, S. C.; The People *v.* Mather, 4 Wend. 232, 252, 254, per Masey, J.; Cundell *v.* Pratt, M. & M. 108, per Best, C. J.

[2] Macdonnell *v.* Evans, 21 L. J., C. P., 142, per Cresswell, J.; 11 Com. B. 935, S. C.

[3] Slatterie *v.* Pooley, 6 M. & W. 664; Earle *v.* Picken, 5 C. & P. 542, per Parke, B. See ante, §§ 381—384.

[4] Macdonnell *v.* Evans, 21 L. J., C. P., 145, per Williams, J.; 11 Com. B. 945, S. C.

[5] Gr. Ev., § 452, in part.

[6] 6 Parl. Deb. 167—245.

[7] 46 Geo. 3, c. 37. The law in New York is the same, Civil Code, § 1854. In America the English Act is generally considered as declaratory of the true doctrine of the common law. See Bull *v.* Loveland, 10 Pick. 9; Baird *v.*

declaring "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is othewise subject to a civil suit, either at the instance of the Crown, or of any other person or persons."

§ 1318. Though the statute just cited does not in terms refer to the *production of documents*, its spirit seems strictly applicable to such a case; and accordingly it has been held, that a witness cannot be excused from producing papers in his possession, merely because their production may subject him to a civil action, or be otherwise prejudicial to his pecuniary interests.[1] If, indeed, the documents called for be the title deeds of the witness, or perhaps, if they be instruments in the nature of title deeds, they will fall within the rule of protection;[2] because, in the present complicated state of the law of real property, it might cause infinite mischief, if witnesses were compellable to disclose by what title they held their estates. So, a witness, or a party in the cause, is not bound, either at law or in equity, to produce any documents which may render him liable to punishment, or expose him to penalty or forfeiture,[3] unless they be of a public nature, or such as are directed by statute to be kept and produced.[4]

§ 1319. In all the cases hitherto put, where the witness is not compellable to answer, or to produce documents, the *privilege is his*, and *not that of the party;* and consequently, counsel in the

Cochran, 4 Serg. & R. 397; Naylor *v.* Semmes, 4 Gill & J. 273; Stoddart *v.* Manning, 2 Har. & G. 147; Copp *v.* Upham, 3 N. Hamp. 159.

[1] Doe *v.* Date, 3 Q. B. 609, 618, per Patteson, J.; Doe *v.* Earl of Egremont, 2 M. & Rob. 386, per Rolfe, B. These cases appear to overrule Miles *v.* Dawson, 1 Esp. 405, and Laing *v.* Barclay, 3 Stark. R. 42.

[2] Doe *v.* Date, 3 Q. B. 609; Pickering *v.* Noyes, 1 B. & C. 263; 1 St. Ev. 88.

[3] Parkhurst *v.* Lowten, 1 Mer. 400; 2 Swanst. 216, S. C.; Whitaker *v.* Izod, 2 Taunt. 115; R. *v.* Dixon, 3 Burr. 1687.

[4] Bradshaw *v.* Murphy, 7 C. & P. 612.

cause will not be permitted to make the objection. Neither will the witness be allowed to employ counsel of his own to support his claim to protection.[2] Nor even is the judge *bound*, as it would seem, to warn the witness of his right to demur to the question,[3] though, in the exercise of his discretion, he may occasionally deem it right to do so.[4] At one time it was thought, that if a witness chose to reply in part, he might be compelled to answer everything relative to the transaction; but this doctrine has been overruled by a majority of the fifteen judges; and it is now finally determined that after a witness has been sworn, he may claim his protection *at any stage of the inquiry*, and if he do so, he cannot be forced to answer any additional questions tending to criminate him. In short, he cannot be carried further than he chooses voluntarily to go himself.[5]

§ 1320. On two recent occasions attempts have been made to extend to an unwarrantable length this protection against self-crimination. In the one case an action had been brought against Cardinal Wiseman for an alleged libel, to which the defendant had pleaded not guilty. At the trial before the Lord Chief Baron the plaintiff failed in his attempts to prove the fact of publication, and as a last resource he proposed to examine the defendant himself. The Cardinal through his counsel *declined to be sworn*, urging that on the simple issue of "guilty or not

[1] Thomas *v.* Newton, M. & M. 48, n., per Lord Tenterden; R. *v.* Adey, 1 M. & Rob. 94, per id. See Marston *v.* Downes, 1 A. & E. 34, per Lord Denman; and Doe *v.* Date, 3 Q. B. 609.

[2] Doe *v.* Earl of Egremont, 2 M. & Rob. 386; Doe *v.* Date, 3 Q. B. 621, per Coleridge, J., citing a decision of Park, J.

[3] Att.-Gen. *v.* Radloff, 10 Ex. R. 88, per Parke, B.

[4] Paxton *v.* Douglas, 16 Ves. 242; Fisher *v.* Ronalds, 12 Com. B. 764, per Maule, J.

[5] R. *v.* Garbett, 1 Den. C. C. 236; 2 C. & Kir. 474, S. C. pro. Parke, Alderson, Rolfe, Platt, Bs., Coltman, Maule, Wightman, Cresswell, Williams, Js.; con. Lord Denman, Wilde, C. J., Pollock, C. B., Patteson, Coleridge, Erle, Js.; King of the Two Sicilies *v.* Willcox, 1 Sim. N. S., 301, 320, 321, per Lord Cranworth. These cases overrule Dixon *v.* Vale, 1 C. & P. 278, per Best, C. J.; East *v.* Chapman, 2 C. & P. 573, per Abbott, C. J.; M. & M. 47, S. C.; and Ewing *v.* Osbaldiston, 6 Sim. 608; and confirm Ex parte Cossens, re Worrall, Buck, 531, 545, per Lord Eldon. See, however, Chadwick *v.* Chadwick, 22 L. J., Ch., 329, per Turner, V.-C.

guilty," no question could legally be put to him, the answer to which would not fall within the rule of protection, and that it was alike useless and vexatious to swear a man, when no evidence pertinent to the issue could be extracted from him. On the other hand it was urged with much force, that the objection had been taken too soon; that the plaintiff had a clear right to call his opponent as a witness, to cause an oath to be administered to him, and to ask him whatever questions he liked which were relevant to the issue; and that it was not until after the defendant had been sworn, and the questions had been put to him, that he was legally entitled to claim his protection. The learned judge erroneously ruled that the Cardinal need not be sworn, but the only result of this ruling was, that the parties were put to the annoyance and expense of a new trial, which in due course was granted by the Court of Exchequer.[1] The other case[2] involved the same principle. It was an action of trover brought by one Osborn against the London Dock Company for certain pipes of port wine. The defendants alleged that the plaintiff had deposited with them "sour wine," the produce of "rummage sales," and that afterwards, by some means which were not miraculous but fraudulent, the wine had been converted into "sound port." The theory was, that the sour wine had been recently abstracted, and the empty pipes had been refilled by tapping the other stores in the Dock. To assist the defendants in establishing this case, they applied to the Court for leave to deliver interrogatories to the plaintiff under § 51 of the Common Law Procedure Act, 1854,[3] and the Court, after argument, granted the application, although it was strenuously argued on behalf of the plaintiff, that as the sole object of the questions was to fix him with a guilty participation in the fraud, he had clearly a right to refuse to answer them.

§ 1321. It has been stated more than once, that, if the witness declines to answer, no inference of the truth of the fact can be drawn from that circumstance;[4] but the soundness of

[1] Boyle *v.* Wiseman, 10 Ex. R. 647. The new trial was granted on the 26th of January, 1855, and 1000*l.* damages were ultimately awarded.

[2] Osborn *v.* The London Dock Co., 10 Ex. R. 698.

[3] 17 & 18 Vict. c. 125.

[4] Rose *v.* Blakemore, Ry. & M. 383, per Abbott, C. J.; R. *v.* Watson,

this rule is very questionable; and although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem, that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness.[1] A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult; and to infer dishonour from his conduct would, of course, be unjust;[2] but generally speaking, an honest witness will be eager to rescue his character from suspicion, and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory.[3]

§ 1322. It has before been shown, while treating of evidence excluded from public policy,[4] that in certain other cases witnesses cannot be *compelled*, and in some they will not be *allowed*, to answer questions put to them; as, for instance, where they are interrogated with respect to privileged communications, secrets of state, and some other subjects. As these matters have been already discussed, it is unnecessary to make any further reference to them in the present chapter, excepting to state as a general rule of law, that a witness cannot object to answer any question, merely because it relates to private matters, or because it is immaterial, unless the answer can be withheld on some specific ground of privilege.[5]

§ 1323. Before leaving the subject of cross-examination, it will be right to allude to the effect on the trial, which would be produced by the death or sickness of the witness between his examination in chief and his cross-examination. This subject was much canvassed in Ireland a few years back, in the case of R. *v.* Doolin,[6] where a witness for the Crown having been sud-

2 Stark. R. 158, per Holroyd, J.; 32 How. St. Tr. 495, S. C.; Lloyd *v.* Passingham, 16 Ves. 64, per Lord Eldon; Millman *v.* Tucker, Pea. Add. Cas. 222, per Lord Ellenborough.

[1] See per Bayley, J., in R. *v.* Watson, 2 Stark. R. 153; 32 How. St. Tr. 491, S. C.; Ry. & M. 384, 385, note.

[2] Ph. Ev. 429.

[3] 1 St. Ev. 197.

[4] Ante, Part ii. Chap. xvi.

[5] Tippins *v.* Coates, 6 Hare, 16.

[6] 1 Jebb, C. C. 123.

denly taken ill on cross-examination, the question was, whether the conviction of the prisoner upon his testimony was legal. The twelve judges were almost equally divided in opinion, but the majority held that the conviction was good; and they drew a somewhat questionable analogy between this case, where the testimony had been stopped by the act of God, and that of dying declarations, or of depositions before coroners where the witness had died before the trial.

§ 1324.[1] After a witness has been examined in chief, his *credit may be impeached*, not only by means of cross-examination, but in various other modes. First, witnesses may be called to *disprove* such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue;[2] next, proof may be given under certain restrictions, as before pointed out,[3] of statements made by the witness inconsistent with his testimony at the trial; and thirdly, evidence may be adduced reflecting on his *character for veracity*. But here the evidence must be confined to his *general reputation*, and will not be permitted as to *particular facts;* for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared, without notice, to answer the other.[4] Besides, the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule.[5] The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbours, —what that reputation is,—and whether, from such knowledge, he would believe him upon his oath.[6] The propriety of this last

[1] Gr. Ev., § 461, in part.

[2] As to what are material, see ante, §§ 298, et seq. 1291, et seq.

[3] Ante, §§ 1282, 1300, 1301.

[4] B. N. P. 296, 297; R. *v.* Rookwood, 13 How. St. Tr. 210, per Sir Thomas Trevor, Att.-Gen., argu.; R. *v.* Layer, 16 How. St. Tr. 285, per Pratt, C. J. See Carlos *v.* Brook, 10 Ves. 49; Penny *v.* Watts, 2 De Gex & Sm. 501, 527, 528.

[5] R. *v.* Rookwood, 13 How. St. Tr. 211, per Lord Holt.

[6] R. *v.* Watson, 32 How. St. Tr. 495, 496; R. *v.* De la Motte, 21 How. St. Tr. 811, per Buller, J.; Mawson *v.* Hartsink, 4 Esp. 103, 104, per Lord Ellenborough; The People *v.* Mather, 4 Wend. 257, 258; The State *v.* Boswell, 2 Dev. R. 209, 211; Anon., 1 Hill, S. Car. R. 258.

question, although sustained by no inconsiderable weight of authority both in England and in the United States,[1] has of late been questioned in the American Courts; and it seems that, in those courts at least, a witness will not now be permitted to state his own opinion that another witness is not worthy of belief.[2]

§ 1325. Whether the inquiry into the general character of a witness shall be restricted to his reputation for veracity, or may be made in general terms, *involving his entire moral character* and estimation in society, is a point not yet definitively settled. Still, when it is considered how intimate is the connexion between one crime and another, and moreover, how difficult it may be to find a witness, who can, in strictness, testify as to the character of another for veracity, though that other may, in the language of Sir Charles Wetherell, have been notoriously "guilty of crimes under every letter of the alphabet,"[3] and be consequently undeserving of the slightest credit,—it certainly appears reasonable

[1] Cases cited in last note.

[2] Gass *v.* Stinson, 2 Sumn. 610, per Story J.; Kimmel *v.* Kimmel, 3 Serg. & R. 336—338; Wike *v.* Lightner, 11 Serg. & R. 198; Swift's Ev. 143; Phillips *v.* Kingfield, 1 Appleton's R. 375. In this last case the subject was ably examined by Shepley, J., who observed:—"The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely on any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted on by a jury, is to allow the prejudices, passions, and feelings of that witness, to form, in part at least, the elements of their judgment. To authorise the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision." 1 Applet. R. 379. But, *quære*, whether a witness to impeach reputation may not be asked, in cross-examination, if he would not believe the principal witness on oath.

[3] R. *v.* Watson, 32 How. St. Tr. 458.

that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether, notwithstanding the bad character of the witness in other respects, he has not preserved his reputation for truth. Indeed, one or two English authorities seem to sanction this course;[1] and although a stricter rule is said to prevail in some of the United States, in others, as for instance, in North and South Corolina, and in Kentucky, the general range of inquiry which is here recommended, is distinctly allowed.[2]

§ 1326.[3] It is not, however, enough that the impeaching witness should profess merely to state what he has heard "others" say;

[1] R. v. Rookwood, 13 How. St. Tr. 211; Carpenter v. Wall, 11 A. & E. 803; Lord Stafford's case, 7 How. St. Tr. 1459, 1478; Sharp v. Scoging, Holt's N. P. R. 541, per Gibbs, C. J.

[2] Anon., 1 Hill, 251, 258, 259; the State v. Boswell, 2 Dev. Law R. 209, 210; Hume v. Scott, 3 A. K. Marsh. 261, 262. In this last case, Mills, J., makes the following observations: "Every person, conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time, in the same individual. Add to this, that persons of infamous character may, and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining, that they are false in their words or oaths. At the same time they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practise those other vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavourable to their truth as witnesses, by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held in the society or neighbourhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinise his statements more strictly; while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath."

[3] Gr. Ev., § 461, in part.

for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation.[1] And, in ordinary cases, the witness should himself come from the neighbourhood of the individual, whose character is in question; for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries.[2]

§ 1327. Where the general reputation of a witness has been thus impeached, the party calling him may *re-establish his credit,* by cross-examining the witnesses, who have spoken against him, as to their means of knowledge and the grounds of their opinion,[3] or as to their hostile feelings towards the person whose testimony they have discredited,[4] or as to their own character and conduct, or by calling other witnesses, either to support the character of the first witness, or to attack in their turn the general reputation of the impeaching witnesses.[5] How far this plan of recrimination may be carried at common law, is not yet determined; though in courts of equity the practice is in conformity with the doggrel rule of the civil law,

In testem testes, et in hos, sed non datur ultra;

that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of these last.[6]

§ 1328.[7] After a witness has been cross-examined, the party who called him has a *right to re-examine* him, and to ask all questions which may be proper to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the

[1] Boynton v. Kellogg, 3 Mass. 192, per Parsons, C. J.; Wike v. Lightner, 11 Serg. & R. 198—200; Kimmel v. Kimmel, 3 Serg. & R. 337, 338.

[2] Mawson v. Hartsink, 4 Esp. 103, per Lord Ellenborough; Douglass v. Tousey, 2 Wend. 352.

[3] Mawson v. Hartsink, 4 Esp. 103, 104.

[4] Long v. Lamkin, 9 Cush. 361, 365.

[5] 2 Ph. Ev. 432.

[6] Lord Stafford's trial, 7 How. St. Tr. 1484.

[7] Gr. Ev., § 467, in great part.

motive, or provocation, which induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[1] This point, after having been much discussed in the Queen's case, was brought before the Court several years afterwards, when the learned judges held it to be settled law, that proof, on cross-examination, of a detached statement made by or to a witness at a former time, does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved.[2] Therefore, where a witness had been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not connected with the assertions to which the cross-examination related, although they were connected with the subject-matter of the suit.[3] But if a witness admits on cross-examination, that he has formerly made statements inconsistent with his present testimony, or if that fact be proved by independent evidence, the witness may be asked, on re-examination, to explain his motives for making such inconsistent statements.[4]

§ 1329.[5] If the counsel chooses to cross-examine the witness to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription to a declaration for trespass in G., and the plaintiff's witnesses were asked,

[1] Such was the opinion of seven out of eight judges in the Queen's case, as delivered by Lord Tenterden, 2 B. & B. 297; R. v. St. George, 9 C. & P. 488, per Parke, B.

[2] Prince v. Samo, 7 A. & E. 627; 3 Nev. & P. 139, S. C.; recognised in Sturge v. Buchanan, 10 A. & E. 605.

[3] Prince v. Samo, 7 A. & E. 627. In this case the opinion of Lord Tenterden, in the Queen's case, 2 B. & B. 298, that evidence of the whole conversation, if connected with the suit, was admissible, though it related to matters not touched in the cross-examination, was considered and overruled.

[4] R. v. Woods, 1 Crawf. & Dix, Cir. R., 439, per Burton, J.

[5] Gr. Ev., 468, almost verbatim.

in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user in such other places.[1] But an adverse witness will not be permitted to obtrude such irrelevant matter in answer to a question not relating to it; and if he should do so, the party cross-examining may apply to have the answer struck out of the judge's notes, after which the witness cannot be re-examined on the subject.[2] If, however, the cross-examining counsel omit to take this course, the re-examination will be allowed.[3]

§ 1330.[4] Where evidence of contradictory statements, or of other improper conduct on the part of a witness, has been either elicited from him on cross-examination, or obtained from other witnesses, with the view of impeaching his veracity,—his *general character* for truth being thus, in some sort, *put in issue*,—it has been deemed reasonable to admit general evidence, that he is a man of strict integrity and scrupulous regard for truth.[5] But evidence that he has on other occasions made statements, similar to what he has testified in the cause, is not admissible,[6] unless he be charged with a design to misrepresent, in consequence of his relation to the party, or to the cause; in which case it may be proper to show, that he has made a similar statement before that relation existed.[7] So, if the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible.[8] But mere contradiction among witnesses examined

[1] Blewett *v.* Tregonning, 3 A. & E. 554; 5 N. & M. 308, S. C.

[2] Id., 3 A. & E. 554, 565, 581, 584.

[3] Id.

[4] Gr. Ev., § 469, almost verbatim.

[5] R. *v.* Clarke, 2 Stark. R. 241; Annesley *v.* Anglesea, 17 How. St. Tr. 1348.

[6] B. N. P. 294; R. *v.* Parker, 3 Doug. 242, 244, per Buller, J.; Anon., per Eyre, C. J., cited 2 Ph. Ev. 445; Berkeley Peerage, per Lord Redesdale, cited id. These cases overrule Lutterell *v.* Reynell, 1 Mod. 283.

[7] 2 Ph. Ev. 446; 2 Poth. on Obl. by Evans, 251.

[8] Doe *v.* Stephenson, 3 Esp. 284; 4 Esp. 50, S. C., cited and approved by Lord Ellenborough in The Bishop of Durham *v.* Beaumont, 1 Camp. 207—210, and in Provis *v.* Reed, 5 Bing. 435; 3 M. & P. 4, S. C.; Doe *v.* Wood, cited by Burrough, J., 5 Bing. 439.

in court supplies no ground for admitting general evidence as to their character;[1] though if fraud, or other improper conduct, be imputed to any of them, such evidence will then be received.[2]

§ 1331. The judge has always a discretionary power, with which the Court above is very unwilling to interfere,[3] of *recalling witnesses* at any stage of the trial, and of putting such legal questions to them as the exigencies of justice require.[4] He will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact;[5] though the application will in general be entertained, if made before the closing of the plaintiff's case.[6] So, if it be discovered, after a witness has been cross-examined, that his testimony at the trial relative to the subject-matter of the cause differs from some other statements formerly made by him, the Court will allow him to be recalled if still within reach, and to be further cross-examined, in order to lay a foundation for impeaching his credit by producing witnesses to contradict him.[7] If, however, the witness cannot be found, the proof of the other statements must be rejected.[8] If a question has been omitted in the examination in chief, and cannot, in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for the counsel to request the judge to make the inquiry; and such a request is generally granted.[9]

[1] Bishop of Durham *v.* Beaumont, 1 Camp. 207.

[2] Annesley *v.* Anglesea, 17 How. St. Tr. 1348.

[3] Middleton *v.* Barned, 4 Ex. R. 243, per Parke, B.

[4] R. *v.* Watson, 6 C. & P. 653. The same law prevails in Scotland, for the Act of 15 & 16 Vict., c. 27, § 4, expressly enacts, that "it shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled."

[5] Murray *v.* Sheriffs of Dublin, 1 Arm. Mac. & Og. 130, per Brady, C. B.; Johnston *v.* Clinton, id. 123, per id.; Kelly *v.* Smith, id. 150, per Crampton, J.; Bell *v.* Stewart, id. 401, per Brady, C. B.

[6] White *v.* Smith, 1 Arm. Mac. & Og. 171, per Brady, C. B.; Casson *v.* O'Brien, id. 263, per Pennefather, C. J.

[7] The Queen's case, 2 B. & B. 312, 313.

[8] Id.

[9] 2 Ph. Ev. 408.

§ 1332. In former times, when the evidence of witnesses called on opposite sides was directly conflicting, the Court would often direct that the witnesses should be *confronted;* and on one remarkable occasion, no less than four witnesses were for this purpose placed together in the box.[1] This practice, which still prevails largely in the County Courts, and is there often productive of highly useful results, has, for some unexplained reason, grown into comparative disuse at Nisi Prius. This is to be regretted; for the practice certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth.[2]

[1] Annesley *v.* Anglesea, 17 How. St. Tr. 1350.

[2] Mr. Justice Cowen, in his note to Ph. Ev. vol. ii. p. 774, illustrates the utility of this practice by a case, "in which a highly respectable witness, sought to be impeached through an out-of-door conversation, by another witness, who seemed very willing to bring him into a contradiction, upon both being placed upon the stand, furnished such a distinction to the latter as corrected his memory, and led him in half a minute to acknowledge that he was wrong. The difference lay only in one word. The first witness had now sworn that he did not rely on a certain firm as being in good credit. It turned out that, in his former conversation, he spoke of a partnership, from which one name was soon afterwards withdrawn, leaving him now to speak of the latter firm thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the title of the two firms was so nearly alike, that the ear would easily confound them; and had it not been for the colloquium thus brought on, an apparent contradiction would, doubtless, have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit, which had been given to another on the fraudulent representations of the defendant."

CHAPTER IV.

PUBLIC DOCUMENTS.

§ 1333.[1] WRITINGS are divisible into two classes, PUBLIC and PRIVATE. The former consists of the acts of public functionaries, in the *Executive, Legislative,* and *Judicial* Departments of Government; including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To the same class may be referred foreign acts of State, and the judgments of foreign courts. In the present chapter it is proposed to treat of all such public documents; and the inquiry will be directed, *first,* to the MEANS OF OBTAINING AN INSPECTION OR COPY of them; *secondly,* to the METHOD OF PROVING them; and *thirdly,* to their ADMISSIBILITY AND EFFECT.

§ 1334. In former times it seems to have been considered necessary to obtain the sanction of the Attorney-General, in order to entitle any private person to inspect, or take copies of, the *general records of the realm.*[2] At the commencement, however, of the present reign a better system was established, and most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls. The statute[3] by which this alteration was effected, contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them; but it states in the preamble, that "it is expedient to establish one record office and a better custody, and to allow the free use of any public records, as far as stands with their safety and integrity, and with the public policy

[1] Gr. Ev., § 470, in great part.

[2] Legatt *v.* Tollervey, 14 East, 306, per Lord Ellenborough; Doe *v.* Date, Q. B. 619, per Williams, J.

[3] 1 & 2 Vict., c. 94.

of the realm." It then empowers the Master of the Rolls to make rules "for the admission of such persons as ought to be admitted to the use of such records," and "to fix the amount of fees, if any," to be paid for such use;[1] and it proceeds to authorise either his Honour, or the Deputy-Keeper of the records, to allow copies to be made of any of the documents "at the request and cost of any person desirous of procuring the same."[2] In exercise of the powers thus vested in him, the late Lord Langdale directed,[3] that all the public record offices should be open daily from ten till four, excepting on Sundays and a few holydays,[4]—he prescribed a very moderate scale of fees,[5] which are not chargeable

[1] 1 & 2 Vict., c. 94, § 9. [2] § 12.

[3] In 11 Beav. xxii. et seq., the rules are set out at length.

[4] 2nd Rep. of Deputy-Keeper of Public Rec. i., Append. p. 14. The holydays are 24th May, her Majesty's birthday; 28th June, her Majesty's coronation; Good Friday and Saturday following; Easter Monday and Tuesday; Whit-Monday and Tuesday; Christmas-day to New-Year's-day, inclusive; and such days as may be appointed for public fasts or thanksgivings. Another rule allows a party, upon the inspection of a record, to take notes, extracts, or copies therefrom, in pencil, as he may think fit.

[5] Id., p. 15. The table of fees is as follows:—

	£	s.	d.
For a general search in all the calendars or indexes of each office	0	1	0
For inspection of records, the fee to cover all the use which may be made of the record for the current week:—			
Each separate roll of Chancery, or other roll of consecutive enrolments, excepting the specification rolls at the Rolls Chapel	0	1	0
The rolls, files, or bundles of proceedings of Courts of Common Law, each year, i. e., the records of the four terms to be covered by the fee	0	1	0
Rolls of ministers' and receivers' accounts, court rolls, surveys, extents, terriers, deeds, and miscellaneous documents, classed topographically under one head, whether of parish, town, vill, manor, lordship, borough, city, deanery, archdeaconry, or diocese, each set or series	0	5	0
Single records of the last-mentioned description	0	1	0
Specifications at the Rolls Chapel, each, and which is to include the fee for search	0	1	0
Post-mortem inquisitions, and other inquisitions upon the file, returns to commissions, pedes, chirographs, and concords of fines	0	1	0
General inspection of the last-mentioned documents as to any family or place	0	5	0

at all to "*literary inquirers,*"[1]—and he instructed the assistant-keepers to give to *all applicants* every information and assistance in their power, not merely from the calendars and indexes, but also from their own knowledge of records.[2]

§ 1335. Indeed, his Honour took from the first a truly enlightened view of the privileges of the public as connected with these documents; and, in a letter which he wrote to the Premier shortly after the passing of the Act, he thus expressed his sentiments:—"The Records have justly been called the *Muniments of the*

	£	*s.*	*d.*
Rolls of Parliament, or other parliamentary proceedings, each Parliament	0	1	0
Proceedings in Courts of Equity, each suit	0	1	0
Every bound book, portfolio, or volume, without reference to the nature or number of the documents which it may contain	0	1	0
All other documents not before enumerated, each	0	1	0
[If the number *bonâ fide* required for prosecuting any search relating to any family, place, or single object of inquiry, shall exceed five, then it shall be in the discretion of the assistant-keeper to remit the fees for all above that number.*]			
For copies of records:—			
Under three folios of 90 words	0	1	6
Above three folios, per folio	0	0	6
[The fee for inspection of a record to be deducted, if a copy be taken from the record produced.]			
For examination and authentication:—			
Under three folios, if required	0	1	6
Above three folios, per folio, if required	0	0	6
For enrolment of any specification, per folio	0	0	6
For annexing drawings or maps to any enrolment, or specification	0	1	0
For attendance at the bar of the House of Lords, or elsewhere, for the purpose of producing records, including the production thereof, or for giving evidence upon the records, per diem	2	2	0
Attending the Master of the Rolls upon a vacation	0	5	0

[1] Letter of Lords of the Treasury, dated 17th Nov., 1851.

[2] 2nd Rep. of Deputy-Keeper of Public Rec. i., Append., p. 15.

* This direction always receives the most liberal construction, particularly with respect to those cases in which the search is attended with difficulty.

Kingdom and the People's Evidences; and they ought to be kept and managed under such arrangements, as may afford to the public the greatest facility of using them that is consistent with their safety. The public ought to have access to them for the purpose of easily obtaining information upon the subjects to which the records relate, and ought to be enabled easily to obtain authentic copies of all documents, which can be adduced as evidence in the establishment or defence of rights, which are at issue in the course of judicial or Parliamentary proceedings."[1]

§ 1336. Although, at the present day, the question whether the *public have a strict legal right to inspect these records* is not likely to be mooted, it would be difficult to establish the right, *except* as to such of the documents as are the *records* of *the superior courts* of law or equity; and even with respect to these, it may be doubtful whether the Queen's Bench would interfere by mandamus, unless the applicant was prepared to show that he was interested in the document which he sought to inspect.[2] Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the Court, or of the chief executive magistrate, or of the head of the department under whose control they may be kept, be *injurious to the public interests,* an inspection would not be granted.[3]

§ 1337. As one of the principal objects contemplated by the Legislature in passing the Act of 1 & 2 Vict., c. 94, was the establishment of a *general Record Office,* in lieu of the many repositories which previously existed, a new building has recently been erected on the Rolls' Estate in Fetter-lane, which is applied to that desirable purpose. This building, however, in its present state is not sufficiently large to contain the whole of the papers; and although all the records, which were formerly

[1] Dated 7th Jan. 1839, and cited 1st Rep. of Deputy-Keeper of Pub. Rec. App. 67.

[2] See R. *v.* Staffordshire Js., 6 A. & E. 99, 100, per Lord Denman.

[3] Ante, §§ 860, 866.

deposited in the Tower of London, and many of those which used to be kept in the Rolls House and Chapel, have been removed thither, a vast number of documents are still lodged in the Stone Tower annexed to Westminster Hall, in the Chapter House at Westminster, and in the Carlton Ride.

§ 1338. Among the records now under the custody of the Master of the Rolls, may be *enumerated* the following:—All the records of the superior courts of common law or equity, which are more than *twenty* years old; the records, muniments, and writings of the Marshalsea, Palace, and Peveril Courts recently abolished;[1] the records late in the custody of the Queen's Remembrancer, including those of the abolished offices of the Pipe, the Lord Treasurer's Remembrancer, the foreign Apposer, the Clerk of the Estreats, the Surveyor of Green Wax, and the Clerk of the Nichils; the records of the Augmentation Office, the King's Silver Office, the Alienation Office, and the Chirographer's Office; records of the Admiralty Courts; the log-books of the navy; various branches of the correspondence and documents of the Admiralty and Navy Boards; the charity commission papers; various records of forfeited estates; the French claim commission papers; duplicates of land and assessed taxes; population returns; some records relating to the land revenue;[2] many of the equity records of the Welch courts; the fines and recoveries, and other records of the Chester circuit; the records of the Court of Wards and Liveries; some of the proceedings in the Star Chamber and the Court of Chivalry; the Pell records; the records of first fruits and tenths; Domesday Book; Parliament rolls; statute rolls; patent rolls; close rolls; some of the surveys of lands which formerly belonged to the Crown; lieger-books and chartularies of the dissolved monasteries, priories, &c.; and some very valuable Treasury papers.[3] The legal reader will

[1] 12 & 13 Vict., c. 101, §§ 14, 16. [2] As to the remainder, see post, § 1339.

[3] This list is compiled from the annual reports of the Deputy-Keeper of the public records, and, although not offered as anything like a complete list, it is believed to be accurate so far as it goes. Those who wish for fuller information on the subject are referred to "the Handbook to the Public Records," which was published by the late Mr. F. S. Thomas, in 1853, and was printed by Messrs. Eyre and Spottiswoode. Besides the documents

observe that very many of the documents here alluded to are not strictly records; but this circumstance is rendered immaterial by the Act of 1 & 2 Vict., c. 94, which provides that the word "records" in that Act shall be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature, belonging to her Majesty, or, on the 14th of August, 1838, deposited in any of the offices or places of custody in the Act mentioned.[1]

§ 1339. In addition to the records, which are now placed under the control of the Master of the Rolls, there are many *other documents of a public character*, the *custody* of which belongs to *particular courts and offices.* Among these may be enumerated the records of the Duchy of Lancaster, which are at present deposited in Lancaster-place, adjoining Waterloo-bridge; the records of the Herald's College,[2] most of which will be found either in the College itself at St. Bennet's Hill, St. Paul's, or in the Harleian Library; the records of the State Paper Office, the repository for which is in Duke-street, St. James'-park; most of the land revenue records, which parties interested may inspect at the "Office of land revenue records and inrolments" in Spring Gardens;[3] the records of baptisms, marriages, and burials in India,[4] which are deposited at the East India House; and the

enumerated above, there are, at the Record Office, a vast quantity of curious miscellaneous manuscripts, minute books, indices, calendars, &c., which were either collected by the late record commissioners, or by persons employed in the Record Office, together with many important transcripts from the royal or public archives of France, Normandy, Belgium, Saxony, Prussia, Bavaria, Hamburgh, Portugal, Switzerland, and Italy. But all these are merely deposited for convenience with the Master of the Rolls, and are not in official custody under the Act.

[1] See §§ 20, and 1 & 2.

[2] As to these, see Hubb. Ev. of Suc. 538—566.

[3] See 2 Will. 4, c. 1, §§ 15, 20, 22. Some of these records are at the Carlton Ride, ante, § 1338. The audited accounts of the Commissioners of Woods and Forests are now deposited as of record in the Land Revenue Office, 7 & 8 Vict., c. 89.

[4] In Bengal, from 1713 to 1837; at Madras, from 1698 to 1834; in Bombay, from 1709 to 1837; and at St. Helena, from 1767 to 1835. See p. 13 of Rep. of Comms., appointed to make inquiries respecting non-parochial registers, published 1838.

registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, and which are now placed in the registry of the Consistory Court of London.[1]

§ 1339 A. The Act which has established the New Court of Probate contains several important provisions with respect to the custody and inspection of original wills, and the inspection of the calendars of the grants of probate and administration. In the first place, all persons who heretofore either had jurisdiction to grant probate or administration, or had the custody of the papers of any Court of Probate, are directed, upon receiving a requisition under the seal of the New Court from a registrar, to transmit to the place specified in such requisition, "all records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be easy of reference,

[1] "These registers were first received in the registry of the Consistorial Court of London, in 1816, and may be divided into three classes :—1. Certificates of baptisms and marriages, bearing the signatures of the parties and witnesses, (which, with very few exceptions, is the case) and authenticated by the British envoy or minister, as having been performed in his house, and which have from time to time been sent through the Foreign Office to the registry of the Bishop of London. In this class may be included the registers from Oporto from 1706 to 1802, and the registers from the Cape of Good Hope, Gibraltar, and Geneva. These are original books, in which the entries are signed by the parties, and authenticated by the chaplains. 2. Transcripts from original registers, certified by the ministers of the different places, in the same manner as the transcripts under the Act of 52 Geo. 3, c. 146, for the regulation of transcripts deposited with the registrars of the several dioceses. A book of transcripts also from the register kept at the British embassy in Paris, from 1816 to 1833, and continued to the present time ; and a transcript of the registers of St. Petersburgh from 1706 to the present time. 3. A book of registers, transmitted from Cronstadt, which appear to have been transcribed, but they are not certified as such."—p. 11 of Rep. of Comms., cited in last note.

under the control and direction of the Court."[1] The statute next enacts, that "there shall be one place of deposit under the control of the Court of Probate,"—which place for the present is fixed by order of council at No. 6, Great Knight Rider-street, Doctors' Commons,[2]—"in which all the original wills brought into the court, or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the Court and subject to the rules and orders under this Act."[3] Lastly, the judge of the court is directed to cause calendars of the grants of probate and administration to be made and printed from time to time, and copies of these calendars are to be deposited in the district registries, the office of her Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices as the Court may order, "and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."[4]

§ 1340.[5] With respect to the *records of the Queen's Courts*, it has been admitted, from a very early period, that the *inspection* and *exemplification* of these documents are the *common right of the public;* and this right was extended by an ancient ordinance or statute[6] to cases where the subject was concerned against

[1] 20 & 21 Vict., c. 77, § 89 ; 20 & 21 Vict., c. 79, § 96, Ir.

[2] See Gazette of 4th Dec., 1857.

[3] 20 & 21 Vict., c. 77, § 66 ; 20 & 21 Vict., c. 79, § 71, Ir.

[4] 20 & 21 Vict., c. 77, §§ 67, 68. See also 20 & 21 Vict., c. 79, §§ 72, 73, Ir.

[5] Gr. Ev., § 470, in part as to first five lines.

[6] 46 Edw. 3, which is in these words :—"Item prie la commune qe come recordes et qeconqe chose en la Court le Roi de reson devoient demurer illoeqes pur *perpetuel evidence* de touz parties a ycely et de touz ceux a queux en nul manere ils atteignent quant mestier lour fuist, et ja de novel refusent en la Court nostre dit Seignur de serche ou exemplification faire des nulles riens qe purra chier en evidence encontre le Roi ou desavantage de ly, qe pleire ordeiner per estatut qe *serche et exemplification* soient faitz as touz gentz de *qeconqe recorde qe les touche en ascun manere auxibien de ce qe chiet encontre le Roi come autres gentz.* R. *Le Roi le voet.*" This enactment is

the Crown. The statute in question, however, and the common law on which it is partly founded, simply relate to such records as are required by the subject for the purpose of being given in evidence; and, consequently, *they* do not entitle a prisoner, who is charged either with high treason or felony, to a copy of the indictment or of any of the proceedings against him.[1] In most cases of treason, indeed, the accused must now be supplied, ten clear days before his trial, with a copy of the indictment, but this privilege is allowed him in consequence of statutes having been passed for that purpose in the reigns of King William III.[2] and Queen Anne.[3] Still, in ordinary cases of felony, including that class of treasons which consists in compassing the death or personal injury of the Sovereign,[4] the *accused is not,* even at the present day, *entitled to a copy of the indictment;* but all that he can claim as of right is, to have it read slowly to him in open court.[5] This rule, which is the very essence of injustice,[6] fortunately does not *extend to misde-*

not printed in its order in the statute book, perhaps, because it was not made till after the dismission of the Knights of the Shire. It is, however, cited as an Act by Lord Coke, 3 Rep., p. iv., and was so considered by the Court on the trials of Algernon Sydney and Lord Preston. See 9 How. St. Tr. p. 837, and 12 id. 658—663. It is now printed in the Appendix to 9th Vol. of the Stat. at large, p. 45, quarto ed.

[1] R. *v.* Ld. Preston, 12 How. St. Tr. 658—663; Foster Cr. Law, 228, 229.

[2] 7 Will. 3, c. 3, § 1.

[3] 7 Anne, c. 21, § 11, which enacts, that copies of all indictments for high treason and misprision of treason, "shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses." This enactment is extended to Ireland by the Act of 17 & 18 Vict., c. 26. See also 5 Geo. 3, c. 21, § 1, Ir.

[4] See 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, Ir.; 5 & 6 Vict., c. 51, § 1. See also ante, § 875.

[5] R. *v.* Parry, 7 C. & P. 838, per Bolland, B.; R. *v.* Vandercomb, 2 Lea. C. C. 711, 712; R. *v.* Cruise, Ir. Cir. R. 674, per Torrens, J. Though this seems to be the present law in Ireland, it is a curious fact, that in 1641, the Irish judges unanimously resolved, that they had no power by law to refuse to give to the accused a copy of the indictment; and the Irish House of Commons in the same year declared, that judges ought not to deny copies of indictments to parties indicted. See an able note on this subject in 1 Ir. Cir. R. 375—378. See also Bothe's case, Sir Edw. Moore's Rep. 666.

[6] Mr. Chitty observes on this subject, "It is a remarkable circumstance

meanors; the common law, with an inconsistency which admits of no sensible explanation, having vouchsafed to parties liable to fine and imprisonment a privilege, which it refuses to persons on trial for their lives.[1] With respect to the depositions upon which a prisoner has been committed or held to bail, preparatory to his being tried for some indictable crime,[2] he is now entitled by statute, not only to inspect them at the trial without fee,[3] but also to obtain copies of them on payment of a small sum, whatever be the nature of the offence imputed.[4]

that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little opportunity of discovering them." 1 Chit. Crim. Law, 403. The flagrant absurdity of the one rule caused the as flagrant injustice of the other.

[1] Lady Fulwood's case, Cro. Car. 483; 1 Chit. Crim. Law, 404. The Act of 60 Geo. 3 & 1 Geo. 4, c. 4, § 8, enacts, apparently, *pro majori cautelâ,* that "in all cases of prosecutions for misdemeanors, instituted by the Attorney or Solicitor-General, in the Courts [of King's Bench at Westminster or Dublin, or at any session of the peace, session of oyer and terminer, great session or session of gaol delivery in England or Ireland], the Court shall, if required, make order that a copy of the information or indictment shall be delivered after appearance to the party prosecuted, or his clerk in court or attorney, upon application made for the same, free from all expense to the party so applying; provided that such party, or his clerk in court or attorney, shall not have previously received a copy thereof." See also 7 & 8 Geo. 4, c. 53, § 42.

[2] A person who has been committed for want of sureties to keep the peace cannot demand a copy of the examinations on which the commitment proceeded; Ex parte Humphrys, 19 L. J., M. C., 189; 1 L. M. & P. 323, S. C. nom. R. *v.* Herefordshire, Js.

[3] 6 & 7 Will. 4, c. 114, § 4, enacts, that "all persons under trial shall be entitled, at the time of their trial, to inspect without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

[4] 11 & 12 Vict., c. 42, § 27, enacts, that "at any time *after* the examinations aforesaid shall have been completed, and *before* the first day of the assizes or sessions, or other first sitting of the Court, at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words." For the former law, see 6 & 7 Will. 4, c. 114, § 3, which although repealed as to depositions taken before justices by § 34 of 11 & 12 Vict., c. 42, seems still to be in force with respect to coroners. R. *v.* White,

§ 1341. It has been doubted whether a person *tried for felony and acquitted* is *entitled to a copy of the record* of his acquittal, for the purpose of giving it in evidence in an action for *malicious prosecution.*[1] This doubt has arisen in consequence of an order made by five judges in the reign of Charles II., for the regulation of the Sessions at the Old Bailey; and which directs, that "no copies of any indictment for felony be given without special order upon motion made in open court, at the general gaol delivery upon motion;[2] for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the King upon just occasions."[3] Now, it is certainly difficult, if not impossible, to establish the legality of this order; for not only does it appear to be directly at variance with the Act of 46 Edward III.,[4] but it seems also to be wholly inconsistent with the provisions of Magna Charta, "nulli negabimus vel differemus justitiam." Accordingly, in the case of a prosecution for robbery, evidently vexatious, where the prisoner, after his acquittal, applied to Chief Justice Willes for a copy of the indictment, his lordship refused to make an order on the subject, on the ground that none was necessary; declaring, that, by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right and title

5 Cox, C. C. 562, per Platt, B. The Irish law is regulated by § 14 of 14 & 15 Vict., c. 93, which enacts, that "at any time after the examinations in any proceedings for an indictable offence shall have been completed, and on or before the first day of the assizes or sessions or other first sitting of the Court at which any person committed to gaol or admitted to bail is to be tried, such person may require and shall be entitled to receive from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, (or copies of depositions taken at any inquest in case of murder or manslaughter,) on payment of a reasonable sum for the same, not exceeding a sum at the rate of three halfpence for each folio of ninety words."

[1] Browne *v.* Cumming, 10 B. & C. 70. See R. *v.* Dunne, Ir. Cir. R., 407, where a prisoner having been convicted, the Court refused to allow him a copy of the depositions of a crown witness, for the purpose of assigning perjury upon them.

[2] Sic.

[3] 7th Res., cited in Kelyng, 3. The five judges were Hyde, C. J., Orlando Bridgman, C. J., Twisden, Tyril, and Kelyng, Js.

[4] Ante, p. 1201, n. 6.

to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out.[1]

§ 1342. This statement of the law would seem to be substantially correct, and if so, the order of the judges, confirmed though it be by a decision of Lord Holt,[2] is illegal; but, be this as it may, thus much may be safely affirmed; first, that the order does not extend to misdemeanors, but that in such cases the prisoner has an absolute right to a copy of the indictment on which he has been either acquitted or convicted;[3] secondly, that even in cases of felony, where the party acquitted brings an action for malicious prosecution, the judge at Nisi Prius is bound to receive in evidence a true copy of the indictment, though proved to have been obtained without an order;[4] and lastly, that, for the purpose of pleading either autrefois acquit, or autrefois convict, the prisoner is entitled to have a copy of the former record, whatever be the nature of the accusation; and if the Court where he was first tried refuses to grant him one, the Queen's Bench will enforce his right by mandamus.[5]

§ 1343.[6] It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction;[7] but it is clear that every one has a *right to inspect* and *take copies* of the parts of the proceedings in which he is *individually interested*. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply

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[1] R. v. Brangan, 1 Lea. C. C. 27. See also Doe v. Date, 3 Q. B. 619, per Williams, J.

[2] Groenvelt v. Burrell, 1 Lord Raym. 253; Carth. 421, S. C.

[3] Morrison v. Kelly, 1 W. Bl. 385, per Lord Mansfield; Evans v. Phillips, 2 Sel. N. P. 1072, per Adams, B.

[4] Legatt v. Tollervey, 14 East, 302; Jordon v. Lewis, id. 305, n.; 2 Str. 1122, S. C.

[5] R. v. Middlesex Js., in re Bowman, 5 B. & Ad. 1113.

[6] Gr. Ev., § 473, in some part.

[7] R. v. Chester, 1 Chit. R. 297, 299, per Abbott, C. J., questioning Herbert v. Ashburner, 1 Wils. 297.

to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose.[1] If his application be refused, the Court of Chancery or the Queen's Bench, upon affidavit of the fact, may send, by a writ of certiorari, either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action.[2] So, where a party, who had been sued in a court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.[3]

§ 1344. Indeed, it may be laid down as a general rule, that the Court of Queen's Bench will *enforce by mandamus the production of every document of a public nature*, in which any one of her Majesty's subjects can prove himself to be *interested*.[4] Every officer, therefore, appointed by law to keep records, ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves, — without putting them to the expense and trouble of making a formal application for a mandamus.[5] But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, or the Court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being

[1] See R. v. Wilts & Berks Can. Co., 3 A. & E. 47; R. v. Leicester Js., 4 B. & C. 892.
[2] R. v. Midlam, 3 Burr. 1720—1722.
[3] Wilson v. Rogers, 2 Str. 1242.
[4] R. v. Staffordshire Js., 6 A. & E. 99, 100, per Lord Denman.
[5] Id.

enforced.[1] Thus, the rate-payers of a county are not entitled to inspect and copy the bills of charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts, and which have been allowed by the sessions, and deposited by the clerk of the peace among the county records.[2] For in such case, the individual rate-payers would have no power to interfere, even though they might prove to demonstration, that the bills had been improperly paid and allowed.

§ 1345.[3] Some other books and documents partake *both of a public and private character*, and are treated as the one or the other, according to the relation in which the applicant stands to them. Thus, a stranger has no right to an inspection of the *rolls of copyhold courts* and of courts baron;[4] but the *copyhold* tenants of a manor are clearly entitled to inspect and take copies of such parts, though of such parts only,[5] of the court rolls, as relate to their own titles, privileges, or interests; and this too, whether an action be pending or not.[6] Indeed, by a general rule of court,[7] it is determined, that "an order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection." It has been held, that this last rule is not strictly confined to cases where the applicant is a copyhold tenant; but if he has a primâ facie title to a copyhold,[8] or is otherwise interested in copyhold property,[9] as, for instance, if he is the

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[1] R. *v.* Staffordshire Js., 6 A. & E. 100, 101, per Lord Denman.

[2] Id. 84; overruling R. *v.* Leicester Js., 4 B. & C. 891. See also R. *v.* St. Marylebone, 5 A. & E. 268.

[3] Gr. Ev., § 474, as to first three lines.

[4] Crow *v.* Saunders, 2 Str. 1005; R. *v.* Shelley, 3 T. R. 142, per Buller, J.

[5] R. *v.* Merchant Tailors' Co., 2 B. & Ad. 128, 129, per Littledale, J.

[6] R. *v.* Tower, 4 M. & Sel. 162; R. *v.* Lucas, 10 East, 235.

[7] Reg. Gen., H. T., 2 Will. 4, § 102; 3 B. & Ad. 389. This rule does not seem to have been annulled by the New Practice Rules of 1853, as these last only annul "all existing written rules of practice" "in regard to *civil actions.*" See 1 E. & B. App. ii.

[8] R. *v.* Lucas, 10 East, 235.

[9] Ex parte Hutt, 7 Dowl. 690, per Coleridge, J.

devisee of a rent-charge on such property,[1] the Court will grant him a rule for a mandamus absolute in the first instance. Even a *freehold* tenant of a manor has a right to inspect the court rolls;[2] though it may, perhaps, be doubtful, whether he must not first show that some suit is actually depending.[3]

§ 1346. Again, the *books of a corporation* are, at common law,[4] regarded as public to a certain extent with respect to its members, but private with respect to strangers. Thus, on the application of a *member*, the Court of Queen's Bench will, in general, grant a rule for a limited inspection of the documents of the corporation,[5] provided it be shown that such inspection is requisite with reference either to a suit then instituted, or at least to some specific dispute or question depending, in which the applicant is interested;[6] but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion.[7] The rule appears to have been sometimes laid down more broadly, and the language ascribed to the Court in one or two cases, would almost lead to the inference, that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body.[8] But this doctrine is now properly exploded; the privilege of inspection being confined to those cases in which the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object.[9] For instance, where certain members of a corporation applied for a mandamus to the master and wardens to allow them to inspect all the documents of the corporation, alleging their

[1] Ex parte Barnes, 2 Dowl. N. S. 20, per Wightman, J.

[2] Addington *v.* Clode, 2 W. Bl. 1030; Hobson *v.* Parker, Barnes, 237, cited by Buller, J., in 3 T. R. 142.

[3] R. *v.* Allgood, 7 T. R. 746. But see R. *v.* Lucas, 10 East, 235, and R. *v.* Tower, 4 M. & Sel. 162.

[4] As to the Statute Law, see post, §§ 1355, 1356.

[5] R. *v.* Beverley, 8 Dowl. 140.

[6] R. *v.* Merchant Tailors' Co., 2 B. & Ad. 115.

[7] Id.

[8] R. *v.* Hostmen of Newcastle, 2 Stra. 1223; R. *v.* Babb, 3 T. R. 581, per Ashhurst, J.

[9] R. *v.* Merchant Tailors' Co., 2 B. & Ad. 115.

belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, the Court held that they had no right on these speculative grounds to the inspection prayed, and discharged the rule with costs.[1] So, where some parties were sued by an incorporated company for alleged misconduct in making false entries in the books of the corporation, while acting in the capacity of directors, the Court held that they were not entitled to a general inspection of the company's books, at least without an affidavit that such inspection was necessary for their defence.[2] In another case, where a shareholder, sued for calls, applied to the Court for a rule to inspect the minute-books of the company, and of the meetings of the directors, "particularly with respect to the calls" in question, the application was rejected, as it appeared to have been made for the purpose, not of assisting the defendant to plead a particular plea, but of enabling him to fish out a defence.[3]

§ 1347. The right of inspection which the members of a corporation enjoy being thus limited, it is only just that this right should be still more restricted in the case of *persons who are not members*; and, accordingly, unless the documents sought to be inspected contain the common evidence of some transaction between the corporation and a stranger, or at least furnish the rule by which the stranger is sought to be bound, he has no right to inspect them, even though he be a defendant in a suit brought by the corporation. Thus, if a corporation were to bring an action against a stranger for tolls, the courts of common law could not grant the defendant leave to inspect the corporation muniments;[4] neither, in such a case, would a court of equity interfere.[5] But, if an action were brought against a party residing in a

[1] R. v. Merchant Tailors' Co., 2 B. & Ad. 115.
[2] Imperial Gas Co. v. Clarke, 7 Bing. 95.
[3] Birmingham, Bristol, & Thames Junc. Rail. Co. v. White, 1 Q. B. 282.
[4] Mayor of Southampton v. Graves, 8 T. R. 590; overruling Mayor of Lynn v. Denton, 1 T. R. 689, and Barnstable v. Lathey, 3 T. R. 303.
[5] Bolton v. Corp. of Liverpool, 3 Sim. 467; 1 Myl. & K. 88, S. C.; recognised in Nias v. Northern & East. Rail. Co., 3 Myl. & Cr. 357.

borough, for the breach of a by-law restraining persons, not freemen, from exercising trades within the limits, the Court would compel the corporation to allow the defendant to inspect the by-law, because it must be taken to have been made for the public weal, and for the rule and government of persons dwelling within the borough.[1]

§ 1348. The rules just mentioned apply with equal force to *parish books.* Thus, *parishioners* have a right to inspect them for ordinary parochial purposes, as, for instance, if a dispute be pending respecting the validity of a rate,[2] or the like; but they are not, as it seems, entitled to have access to them for purposes unconnected with the affairs of the parish.[3] Thus, access to parish books has been refused to a parishioner, who, being sued for a libel upon the vestry clerk, sought to inspect the books, for the purpose of enabling him to plead a justification.[4] So, a parishioner has no right to inspect parish books, for the mere purpose of obtaining information to support his claim to an estate in the parish.[5] Moreover, *strangers* have no right to an inspection at all; and so strictly has this rule been enforced, that where a party brought an action of trespass against parish-officers for entering his house to distrain for poor rates, and the defendants having averred in justification that the house was within the parish, the plaintiff took issue on this fact, the Court held that, at common law, he could not demand an inspection of the parish books, though the defendants alleged that he was a parishioner, for he himself denied the allegation.[6] However, in this case, a bill of discovery having been filed, the Court of Chancery ordered the defendants to produce the rate-books and other parish documents, which related to the matter in question.[7] Again, where

[1] Harrison *v.* Williams, 3 B. & C. 162.

[2] Newell *v.* Simpkin, 6 Bing. 565.

[3] May *v.* Gwynne, 4 B. & A. 301. In R. *v.* Harrison, 2 Sess. Cas. 490; 9 Q. B. 794, S. C., the Court refused to grant a mandamus for a rate-payer of a township to inspect the appointment of overseers of the poor for that township.

[4] May *v.* Gwynne, 4 B. & A. 301.

[5] R. *v.* Smallpiece, 2 Chit. R. 288.

[6] Burrell *v.* Nicholson, 3 B. & Ad. 649.

[7] Burrell *v.* Nicholson, 1 Myl. & K. 680.

the inhabitants of a parish had indicted those of a county for non-repair of a bridge, and the question was, which of the litigants were liable to repair it, the Court refused to compel the prosecutors to allow the defendants to inspect the parish documents, which related to the repair of the bridge.[1]

§ 1349. The books kept by *commissioners of sewers* may be mentioned in the same category with parish books; that is, strangers are not entitled to inspect them; and even parties assessed to the sewers-rate have no general right of inspection, but can only claim access to such entries and proceedings as have reference to the rate to which they are themselves assessed, and to the level where their property is situated.[2] So, where a person was prosecuted for practising physic, not being a member of the College of Physicians, nor having a licence, nor being a graduate of either University, the Court refused to grant him a rule to inspect the *books of the college*, on the ground that he was not a member of that body.[3] It has been held, however, that a *bishop's register of presentations and institutions* is kept for the use of all persons claiming title to livings in his diocese; and, accordingly, where the bishop himself and a private person were adverse claimants of the patronage of a particular benefice, the Court granted a mandamus to compel the bishop to allow his opponent to inspect so much of the register as related to the benefice in question.[4] So, a prebendary may, at all reasonable times, inspect such of the charters, statutes, injunctions, and acts of the Chapter as may be necessary to establish or illustrate his rights concerning his prebend.[5]

§ 1350. On a similar principle, *fundholders* have been held entitled to inspect and take copies of such entries in the *deposit* and *transfer books of the Bank of England*,[6] or of the *East India*

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[1] R. v. Buckingham Js., 8 B. & C. 375.

[2] R. v. Comm. of Sewers for Tower Hamlets, 3 Q. B. 670. See as to books kept by the Metropolitan Board of Works, 18 & 19 Vict., c. 120, § 61.

[3] R. v. Dr. West, cited 2 Wils. 240; 5 Mod. 395, 396, S. C.

[4] R. v. Bp. of Ely, 8 B. & C. 112; S. C. nom. Finch v. Bp. of Ely, 2 M. & Ry. 127.

[5] Young v. Lynch, 1 W. Bl. 27.

[6] Foster v. Bank of England, 8 Q. B. 689.

Company, as relate to stock in which they claim to be interested; and merchants can demand access to such of the *Custom-house books* as contain entries with regard to their goods.[2] The same doctrine renders a limited inspection of any other books and documents a matter of right, when they constitute the common evidence of transactions between public offices and private individuals, and where the inspection is necessary to establish some disputed claim.[3] On the other hand, access to these books will not be granted in favour of persons who have either no interest in them, or who seek to inspect them for some private object unconnected with the purposes for which the books are kept. For instance, where a party brought a qui tam action against a postmaster for interfering in the election of a member of Parliament, the Court refused the plaintiff a rule to inspect the books of the Post-office, because the suit did not relate to any transaction in that office, and the applicant had no interest in its books.[4]

§ 1351. In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence, that may expose him to a criminal charge,[5] neither the Court of Queen's Bench, nor the Court of Chancery,[6] will ever oblige a person to allow the inspection of either public or private documents in his custody, where the inspection is sought for the purpose of *supporting a prosecution against himself.*[7] An information in the nature

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[1] Geery *v.* Hopkins, 2 Lord Raym. 851; 7 Mod. 129, S. C.

[2] Crew *v.* Saunders, 2 Str. 1005.

[3] See note by Mr. Nolan to R. *v.* Hostmen of Newcastle, 2 Stra. 1223, where all the older authorities on the subject are collected and classified. See also R. *v.* King, 2 T. R. 235, per Ashhurst, J., as to the assessments of the land-tax.

[4] Crew *v.* Saunders, 2 Stra. 1005. See Atherfold *v.* Beard, 2 T. R. 610; Benson *v.* Post, 1 Wils. 240. See also ante, § 1348.

[5] Ante, § 1308.

[6] Wigram on Discovery, §§ 130—132, 268—270, 285, et seq. In Lord Montague *v.* Dudman, 2 Ves. Sen. 397, Lord Hardwicke observed, that a bill of discovery would not lie "to aid the prosecution of an indictment or information, or to aid the defence of it." See also Glyn *v.* Houston, 1 Keen, 329.

[7] R. *v.* Purnell, 1 W. Bl. 37; 1 Wils. 239, S. C.; R. *v.* Heydon, 1 W. Bl. 351; R. *v.* Buckingham Js., 8 B. & C. 375; R. *v.* Cornelius, 2 Stra. 1210; 1 Wils. 142, S. C. See Bradshaw *v.* Murphy, 7 C. & P. 712, sed qu.

of a *quo warranto* is not considered as a criminal proceeding within the meaning of this rule;[1] nor is a mandamus, at least if the object be to enforce a civil right;[2] but where the lord of a manor was indicted for not repairing the bank of a river ratione tenuræ, it was in vain urged in support of a rule to inspect the court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right.[3]

§ 1352. Where writs, or other proceedings in a cause, are officially in the custody of an officer of the court, it may be doubtful whether he can be compelled to permit them to be inspected, for the purpose of furnishing evidence in a civil action against himself. For instance, if an action be brought against the keeper of the Queen's prison[4] for the escape of a debtor, has the plaintiff a right to inspect the writ by which the debtor was committed to the defendant's custody? On this point the Courts of Queen's Bench and of Common Pleas have come to opposite conclusions.[5]

§ 1353. In all cases where the interference of a court of law is required in order to obtain the inspection of a document, it must appear by affidavit that an express *demand* to inspect has been made to the proper quarter, and has been distinctly *refused*.[6] It seems also that this demand must come either directly from the applicant or indirectly from his agent, and that it will not suffice if it be made by a person whom the agent has employed for that purpose.[7] In stating that there must be a distinct refusal, it is

[1] R. *v.* Shelley, 3 T. R. 141; R. *v.* Babb, id. 582; R. *v.* Purnell, 1 W. Bl. 45.
[2] R. *v.* Ambergate, &c. Rail. Co., 17 Q. B. 957.

[3] R. *v.* E. Cadogan, 5 B. & A. 902; 1 D. & R. 550, S. C.

[4] 5 & 6 Vict., c. 22.

[5] Fox *v.* Jones, 7 B. & C. 732; Davies *v.* Brown, 9 Moore, 778. See also R. *v.* Chester, Sheriff of, 1 Chit. R. 477.

[6] R. *v.* Wilts & Berks Can. Co., 3 A. & E. 477; 5 N. & M. 344, S. C.; R. *v.* Bristol & Exeter Rail. Co., 4 Q. B. 162. But the objection that the affidavits disclose no sufficient demand and refusal must be taken before the merits are discussed, 4 Q. B. 171, per Lord Denman, recognising R. *v.* East. Count. Rail. Co., 10 A. & E. 531, 545, n. *b.*

[7] Ex parte Hutt, 7 Dowl. 690.

not meant that the word "refuse" or any equivalent expression should be employed, but it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required.[1] Still, nothing short of this will suffice; and therefore, where a shareholder in a company applied to the committee for leave to inspect the books of the company, and was told by the chairman that the committee would take time to consider the request; whereupon, ten days afterwards, he again applied to the clerk, who refused inspection, though it did not appear that the refusal was authorised by the committee; the Court of Queen's Bench held that no sufficient refusal by the committee had been proved, to warrant the making absolute a rule for a mandamus.[2] If on the application of a party, the liberty to inspect books be *offered as a favour*, though *not as a right*, and be consequently declined by the applicant, it may be questionable whether the Court of Queen's Bench will interfere.[3] Where a party applied to a judge on summons for leave to inspect certain books, but the judge, after hearing both parties, referred the question to the Court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal.[4]

§ 1354. The preceding observations have been confined to those cases where the right of inspection depends upon the common law; but it now becomes necessary to advert to some *statutes*, which especially provide for the keeping of particular public documents, and for their inspection by parties interested. Thus the Act of 6 & 7 Will. 4, c. 86, entitles any person to search the register books of *births, baptisms, marriages, deaths and burials*, and the indexes thereto, and to demand certified copies of any entry in the books, on payment of a small fee;[5] the Act of 16 & 17

R. Brecknock & Aberg. Can. Co., 3 A. & E. 222, 223, per Lord Denman and Littledale, J.

[2] R. *v.* Wilts & Berks Can. Co., 3 A. & E. 477; 5 N. & M. 344, S. C.

[3] R. *v.* Trustees of Northleach & Witney Roads, 5 B. & Ad. 978, 982, per Lord Denman.

[4] Birmingham, Bristol, & Thames Junct. Rail. Co. *v.* White, 1 Q. B. 282, 286; 4 Per. & D. 649, S. C.

[5] § 35 enacts, that "every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time

Vict., c. 134, contains similar provisions with respect to searches to be made, and copies and extracts to be taken from the registers of burials kept under the directions of the Metropolitan Interment Act;[1] the *Act for marriages*, passed in the last reign,

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being of any register-book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of *any register-book in his keeping.*" [This will include register-books of *baptisms and burials*, which the rector, vicar, or curate of each parish is bound to keep, under the provisions of 52 Geo. 3, c. 146, § 5.] "And shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee hereinafter mentioned; (that is to say,) for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate."

§ 36 enacts, that "every superintendent-registrar shall cause indexes of the register-books in his office to be made, and kept with the other records of his office; and that every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register-books under the hand of the superintendent-registrar on payment of the fees hereinafter mentioned; (that is to say,) for every general search the sum of five shillings, and for every particular search the sum of one shilling, and for every certified copy the sum of two shillings and sixpence."

§ 37 enacts, that "the registrar-general shall cause indexes of all the said certified copies of the registers to be made, and kept in the general register office; and that every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said indexes between the hours of ten in the morning and four in the afternoon of every day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers; and for every general search of the said indexes shall be paid the sum of twenty shillings, and for every particular search the sum of one shilling; and for every such certified copy the sum of two shillings and sixpence, and no more, shall be paid to the registrar-general, or such other officer as shall be appointed for that purpose on his account." The Act for registering marriages in Ireland contains similar provisions. See §§ 68—70 of 7 & 8 Vict., c. 81, Ir. See also 52 Geo. 3, c. 146, § 5.

[1] § 8 enacts, that "all burials within any burial ground provided under" the Act of 15 & 16 Vict., c. 85, "or this Act, shall be registered in a register-book to be provided by the burial board, providing such ground, (or where the same is provided by the commissioners of sewers of the city of London, then by such commissioners), and kept for that purpose according to the laws in force by which registers are required to be kept by the rectors, vicars, or curates of parishes, or ecclesiastical districts in England; and such register-book shall be so kept by some officer appointed by the said board or commissioners to that duty; and in such register-books shall be distinguished

enacts, that the "marriage notice book," which the superintendent-registrar is bound to keep, shall be "open at all reasonable times without fee to all persons desirous of inspecting the same;"[1] while, under the Act of 3 & 4 Vict., c. 92, which provides for the deposit of certain *non-parochial registers*[2] in the

in what parts of the burial ground, and where the whole of such burial grounds is not consecrated for interment according to the rites of the united Church of England and Ireland, whether in the portion so consecrated or in the portion not so consecrated the several bodies (the burials of which are entered in such register-books,) are buried; and in case such burial-ground has been provided for more than one parish, such register shall be kept or indexed so as to facilitate searches for entries in such books, in respect of bodies from the several parishes; and such register-books, or copies, or extracts therefrom shall be received in all courts as evidence of the burials entered therein, and copies or transcripts of such register-books, verified and signed by such officer as aforesaid, shall be from time to time sent to the registrar of the diocese, to be kept with the copies of the other register-books of the parishes within such diocese; and the said register-books, so far as respects searches to be made therein and copies and extracts to be taken therefrom, shall be subject to the same regulations as are provided by an Act passed in the seventh year of King William the Fourth, intituled an Act for Registering Births, Deaths, and Marriages in England, so far as such regulations relate to register-books of burials kept by any rector, vicar, or curate."

[1] 6 & 7 Will. 4, c. 85, § 5; 7 & 8 Vict., c. 81, §§ 2, 14, Ir.

[2] These registers consist of more than seven thousand books, belonging to one or other of the following religious communities:—The foreign Protestant churches in England; the Quakers; the Presbyterians; the Independents; the Baptists; the Wesleyan Methodists, in their several branches; the Moravians; the Countess of Huntingdon's connexion; the Calvinistic Methodists; and the Swedenborgians. Besides these, a few registers have been deposited, which belong either to Roman Catholic, Irvingite, Inghamite, Bible Christian, New Jerusalemite, Unitarian, or Scotch Church congregations. The registers transmitted from the foreign Protestant churches contain entries of births, baptisms, marriages, deaths, and burials; and those sent by the Quakers are registers of births, marriages, and deaths. The remaining books are for the most part registers of births or baptisms, but there are some registers of deaths or burials, and one or two registers of marriages. The dates of these books range from the middle of the 16th century to the year 1840. Most of the registers were sent to the registrar-general from the minister of the congregation to which they belonged, but a valuable collection of these documents was transmitted from Dr. Williams' library, in Redcross-street, and another smaller one from the Wesleyan Registry in Paternoster-row. It may be observed, that the Jews have declined to part with their registers, as have also the Roman Catholic prelates in most instances. The registers, too, of births and deaths, which are kept at the Heralds' College, from the year 1747 to 1783; the records of Indian

custody of the registrar-general, every person is entitled, on payment of certain fees, but *upon personal application only*,[1] to inspect these registers and the lists of the same,[2] and to have certified extracts of such entries as he may require.[3]

§ 1355. Again, the *Municipal Corporation Act*[4] provides, that the town-clerk[5] of every borough shall, under a penalty of 50*l*.,[6] allow any person to peruse, without fee, first, the freeman's roll at all reasonable times,[7] and next, the list of persons, either claiming to have their names inserted in the burgess-list, or objected to as not entitled to be enrolled therein, at all reasonable hours during

baptisms, deaths, and marriages, deposited at the India House; and the registers of births, baptisms, marriages, and burials of British subjects abroad, transmitted to the registry of the Consistory Court of London, are excluded from the operation of the Act. See Report of Commissioners appointed to inquire into the state, &c., of non-parochial registers, which was presented to Parliament in 1838.

[1] See fly-sheet to "Lists of Non-parochial Registers," published by the registrar-general, pursuant to the Act, in 1841.

[2] A list of the non-parochial registers in the custody of the registrar-general, was published in 1841, and contains a statement—1, of the number marked on each register—2, of the name of the place of worship—3, of the denomination and date of the foundation—4, of the name of the last minister—5, of the number of the books deposited, and the nature of the entries—and, 6, of the period over which each register extends. Copies of this list have been sent to every person, congregation, or society, having had the custody of any of the deposited registers, as also to every superintendent-registrar, and to the registrar-general, to be open for inspection at the respective offices, without fee.

[3] § 5 enacts, that "the registrar-general shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this Act; and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists, and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays and Christmas-day, and Good Friday, but subject to such regulations as may be made from time to time by the registrar-general, with the approbation of one of her Majesty's principal Secretaries of State, and to have a certified extract of any entry in the said registers or records; and for every search in any such register or record shall be paid the sum of one shilling; and for every such certified extract the sum of two shillings and sixpence, and no more."

[4] 5 & 6 Will. 4, c. 76.

[5] See § 16, as to the course of proceeding, if there be no town clerk.

[6] § 48. [7] § 5.

the eight days, Sunday excepted, next preceding each 1st of October;[1] and he is further bound to furnish copies of these respective documents, as also a copy of the burgess-roll, to every person requiring the same, on payment of a reasonable price.[2] Moreover, the treasurer of every borough must keep accounts of his receipts and disbursements, to be open at all reasonable times to the inspection of any of the aldermen or councillors, who are at liberty to take copies or extracts from them; and after such accounts have been audited each year, he must make out a full abstract of their contents, a copy of which may be inspected or purchased by any rate-payer.[3] Every burgess, too, is entitled, at all reasonable times, to inspect, and take copies or extracts from, the book in which are entered the minutes of the borough council, and any order in council for the payment of any money.[4]

§ 1356. Under the Acts regulating Joint-stock Companies,[5]—which now extend to *Joint-stock Banks*,[6]—any person may inspect, and require a certified copy or extract of, any document which is kept by the *registrar of such companies;*[7] and every shareholder of a company duly registered under those Acts is entitled, during business hours, but subject to such reasonable restrictions as the Company in general meeting may impose, to inspect gratis the register of shareholders which is kept at the registered office of the Company.[8] Even strangers have a similar right on payment of a small fee, and they, as well as shareholders, can obtain a copy of any part of the register, if they are prepared to pay sixpence for every hundred words copied.[9] Where, too, any Limited Company has converted a portion of its capital into stock, the register of the stockholders is open to inspection in like manner as the register of shareholders in other companies.[10] So, the *Companies Clauses Consolidation Act*,—which applies to every joint-stock company incorporated by statute since the 8th of May,

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[1] § 17. [2] §§ 5, 17, 23. [3] § 93; 7 Will. 4 & 1 Vict., c. 78, § 22.
[4] 7 Will. 4 & 1 Vict., c. 78, § 22; 5 & 6 Will. 4, c. 76, § 69.
[5] 19 & 20 Vict., c. 47; 20 & 21 Vict., c. 14.
[6] 20 & 21 Vict., c. 49, § 2. [7] 19 & 20 Vict., c. 47, § 106, r. 5.
[8] 19 & 20 Vict., c. 47, § 23. [9] id.
[10] 20 & 21 Vict., c. 14, § 7.

1845, for the purpose of carrying on any undertaking,—contains several provisions authorising parties interested to inspect and demand copies of the books and documents relating to the company's affairs;[1] and the same observations may be made with

[1] 8 & 9 Vict., c. 16, § 10, enacts, that "in addition to the register of shareholders, the company shall provide a book to be called the 'Shareholder's Address Book,' in which the secretary shall, from time to time, enter in alphabetical order the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders with their respective Christian names, places of abode, and descriptions, so far as the same shall be known to the company; and every shareholder, or if such shareholder be a corporation, the clerk or agent of such corporation, may at all convenient times peruse such book *gratis*, and may require a copy thereof or of any part thereof; and for every hundred words so required to be copied, the company may demand a sum not exceeding sixpence." § 45 enacts, that "a register of mortgages and bonds shall be kept by the secretary, and within fourteen days after the date of any such mortgage or bond, an entry or memorial specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the company, or by any person interested in any such mortgage or bond, without fee or reward." § 63 enacts, that "the company shall from time to time cause the names of the several parties who may be interested in [the general capital stock of the company], with the amount of the interest therein possessed by them respectively, to be entered in a book to be kept for that purpose, and to be called the 'Register of Holders of Consolidated Stock;' and such book shall be accessible at all seasonable times to the several holders of shares or stock in the undertaking." §§ 115, 116, provide, that "accounts shall be kept by the directors, and that the books of the company shall be balanced at certain periods. § 117, then enacts, that "the books so balanced, together with such balance-sheet as aforesaid, shall for the prescribed periods, and, if no periods be prescribed, for fourteen days previous to each ordinary meeting, and for one month thereafter, be open for the inspection of the shareholders at the principal office or place of business of the company; but the shareholders shall not be entitled at any time, except during the periods aforesaid, to demand the inspection of such books, unless in virtue of a written order signed by three of the directors." § 118 enacts, that "the directors shall produce to the shareholders assembled at such ordinary meeting, the said balance-sheet, applicable to the period immediately preceding such meeting, together with the report of the auditors thereon, as hereinbefore provided." § 119 enacts, that "the directors shall appoint a book-keeper to enter the accounts aforesaid in books to be provided for the purpose; and every such book-keeper shall permit any shareholder to inspect such books, and take copies or extracts therefrom,

respect to the *Commissioners Clauses Act*,[1] and several other *Consolidation Acts* passed in 1847.[2] The *Railway Clauses Consolidation Act*,[3] which applies to all railways authorised to be constructed since the 8th of May, 1845, contains also an important provision on this subject, for it enacts, in § 107, that every railway company subject to that Act shall, if required, transmit a copy of its annual account of disbursements and receipts, duly audited, and free of charge, to the overseers of the poor of the several parishes, and to the clerks of the peace of the counties through which the railway shall pass; and such accounts shall be open to the inspection of the public at all reasonable hours, on payment of one shilling. An easy mode is thus afforded of ascertaining the sum at which the company should be assessed to the parochial and county rates.

§ 1357. Again, the *Copyright Amendment Act*[4] provides,—and

at any reasonable time during the prescribed periods, and if no periods be prescribed, during one fortnight before, and one month after, every ordinary meeting; and if he fail to permit any such shareholder to inspect such books, or take copies or extracts therefrom, during the periods aforesaid, he shal forfeit to such shareholders for every such offence a sum not exceeding five pounds."

[1] 10 & 11 Vict., c. 16, §§ 31, 55, 76, 88—90.

[2] See Markets and Fairs Cl. Act, 10 & 11 Vict., c. 14, § 50; Gas-works Cl. Act. id. c. 15, § 38; Water-works Cl. Act, id. c. 17, § 83; Harbours, Docks, and Piers Cl. Act, id. c. 27, § 50.

[3] 8 & 9 Vict., c. 20.

[4] 5 & 6 Vict., c. 45, § 11, enacts, that "a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the *inspection of any person* on payment of one shilling for every entry which shall be searched for, or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, *certified under his hand and impressed with a stamp* of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such *copies so certified and impressed* shall be received in evidence in all courts, and in all summary proceedings, and shall be primâ facie proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in case of dramatic or musical pieces, shall be primâ

the provision is incorporated in the *International Copyright Act*,[1]—that a register of the proprietorship of copyright, and of the assignments thereof, shall be kept at the Hall of the Stationers' Company, and shall, at all convenient times, be open to the inspection of any person, on payment of one shilling for every entry inspected; and the officer of the company is also required, on payment of five shillings, to give a certified copy of any entry to any person demanding it. So, under the Acts which relate to the *Copyright of Designs* for Articles of Manufacture, every person is entitled to inspect, at the registrar's office, any design whereof the copyright has expired, and a limited inspection of the designs, the copyright of which is still in force, is also allowed.[2]

§ 1358. Under the Act of 6 & 7 Vict., c. 73, every person is entitled, without fee, to have free access to the *rolls of attorneys* and solicitors, which are kept by the Masters or other officers of the respective courts of law and equity;—to the books containing an abstract of the affidavits sworn by such attorneys or solicitors as have articled clerks, which books are placed under the same custody as the rolls;—and to the books, kept by the registrar, in which are entered the particulars of the declarations signed by attorneys and solicitors preparatory to obtaining their certificates.[3]

§ 1359. Under "the High Peak Mining Customs and Mineral Courts Act, 1851," all persons are at liberty, at convenient times in the day-time, to search and examine all documents in the custody of the Steward of the Barmote Courts by virtue of that Act, upon payment of the fees therein specified.[4]

§ 1360. By the Act of 7 Will. 4 & 1 Vict., c. 83, clerks of the peace, town-clerks, and other persons holding official situations, are required to take custody of all maps, plans, sections, books, and writings, which, by the standing orders of either House of Parliament are directed to be deposited with them, previous to

facie proof of the right of representation or performance, subject to be rebutted as aforesaid."

[1] 7 & 8 Vict., c. 12, § 8.

[2] 5 & 6 Vict., c. 100, § 17; 6 & 7 Vict., c. 65, § 10.

[3] §§ 11, 20, 23.

[4] 14 & 15 Vict., c. 94, § 45.

the introduction of any railway bill, or other bill of a like nature; and the same statute enacts, that all persons interested shall have liberty to inspect, and take copies of, or extracts from, these documents, on payment of certain regulated fees. The provisions of this Act have been extended by several consolidation and other Acts to the maps, plans, and sections of other undertakings, and to the maps, plans, and sections of alterations proposed to be made therein;[1] as also to copies of the Special Acts, by which particular companies, commissioners, or other undertakers have been authorised to act.[2]

§ 1361. Under the *Jurors' Act*, the churchwardens and overseers of every parish are directed to make out a list of every person qualified to serve on juries, and to allow such list to be perused gratis by any inhabitant, at all reasonable times during the first three weeks of September;[3] while the Common Law Procedure Act of 1851, enacts, that a printed panel of the jurors summoned, whether common or special, shall, seven days at least before the sitting of every court, be kept at the sheriff's office for public inspection, and that a printed copy of such panel shall be delivered by the sheriff to any party requiring it, on payment of one shilling.[4]

§ 1362. Under the Act for *registering persons entitled to vote for members of parliament*, every person is at liberty, during the fortnight next after publication, to inspect gratis the lists of claimants,

[1] See Rail. Cl. Consol. Act, 8 & 9 Vict., c. 20, § 9; do. for Scotl. id. c. 33, § 9; Waterworks Cl. Act, 10 & 11 Vict., c. 17, § 21.

[2] Comp. Cl. Consol. Act, 8 & 9 Vict., c. 16, § 161; do. for Scotl. id. c. 17, § 165; Lands. Cl. Consol. Act, id. c. 18, § 150; do. for Scotl. id. c. 19, § 142; Rail. Cl. Consol. Act, id. c. 20, § 162; do. for Scotl. id. c. 33, § 153; Markets and Fairs Cl. Act, 10 & 11 Vict., c. 14, § 58; Gas Works Cl. Act, id. c. 15, § 45; Comm. Cl. Act, id. c. 16, § 110; Waterworks Cl. Act, id. c. 17, § 90; Harbours Docks, and Piers Cl. Act, id. c. 27, § 97; Towns Improvement Cl. Act, id. c. 34, § 214; Cemeteries Cl. Act, id. c. 65, § 66; and Town Police Cl. Act, id. c. 89, § 77. See 9 & 10 Vict., c. 39, § 6. See also 9 & 10 Vict., c. 3, § 13, as to plans, &c. of harbours and other works in Ireland, constructed by Comm. to encourage sea fisheries.

[3] 6 Geo. 4, c. 50, § 9.

[4] 15 & 16 Vict., c. 76, §§ 106—108; 6 Geo. 4, c. 50, § 19. As to the practice in Ireland, see 16 & 17 Vict., c. 113, §§ 110—112 3 & 4 Will. 4, c. 91, §§ 8, 14; and 8 & 9 Vict., c. 67, § 3.

the registers of voters, and the lists of persons objected to, which are made out by the overseers and town-clerks respectively, as also to obtain written or printed copies of these documents, on payment of a small sum.[1] So, after the registers have been revised, any person may purchase, at a stipulated price, from the clerk of the peace, a printed copy of the county register, and from the town-clerk, a like copy of the borough register;[2] and when the poll-books have been deposited with the Clerk of the Crown in Chancery, any party may inspect them, and, on payment of a reasonable sum, obtain an office copy of the whole, or of any part thereof.[3] Under the same Act, every registered elector and claimant may, between the 10th and 31st of August, without payment of any fee, inspect and take extracts from any poor-rate book, for any purpose relating to any claim or objection, made, or intended to be made, by or against him.[4]

§ 1363. Under the *Poor-law Act*, every owner of property, or his agent, and every rate-payer, is entitled to inspect gratis the rules sent by the Poor-law Board to the overseers of his parish, or to the guardians of his union, as also to take copies of such rules, or to require copies to be furnished to him, on payment of a trifling charge.[5] For seven days, too, before the auditing of the overseers' accounts, their rate-books are open, between the hours of eleven and three, for the inspection of every person liable to be rated to the relief of the poor.[6]

§ 1364. Under the *Highway Act*, the surveyors are directed to keep books of account, and these books are open at all seasonable times to the inspection of all inhabitants rated to the highway rate of the parish or district, who are also entitled to take copies or extracts from them without fee.[7] So under the Acts regulating the *Turnpike-roads*, the books containing the oaths, orders, accounts, and proceedings of the trustees, as well as those kept

[1] 6 & 7 Vict., c. 18, §§ 5, 8, 13, 14, 18, 20 As to the law in Ireland, see 13 & 14 Vict., c. 69. [2] § 49. [3] § 95. [4] § 16.

[5] 4 & 5 Will. 4, c. 76, § 18. See 10 & 11 Vict , c. 109, §§ 10, 29.

[6] 7 & 8 Vict., c. 101, § 33. See also 17 Geo. 2, c. 3, § 3; 6 & 7 Will. 4, c. 96, § 5; Tennant *v.* Creston, 2 Sess. Cas. 425; and Tennant *v.* Bell, 9 Q. B. 684. [7] 5 & 6 Will. 4, c. 50, § 40.

for registering mortgages or assignments, may be inspected and copied gratis, at all seasonable times, by the trustees or by any creditor of the tolls;[1] while, by the Act relating to *Turnpike-trusts in South Wales*, similar books, kept by the County Roads' Board, may be inspected and copied without fee by all members of such board, and of all district boards within the county, and by every person paying any rate by that Act authorised to be made.[2]

§ 1365. The annual accounts of the *Trustees* of *Charities*, which are now, by virtue of the Charitable Trusts Acts of 1853, and 1855, either deposited at the office of the Charity Commissioners, or inserted in the books of the local vestries, are open to the inspection of all persons at all seasonable hours, subject to the regulations of the Board of Commissioners; and, moreover, any person may, on payment of a trifling sum, require a copy of any such account or of any part thereof.[3] So, the books of accounts, which the commissioners of *public baths* are directed to keep, may be examined and copied gratis by any commissioner, churchwarden, overseer, or ratepayer, of the parish in which the baths are established.[4] Similar clauses are inserted in the Act, which now regulates the operations of the Metropolitan Board of Works.[5]

§ 1366. Every person is entitled to inspect, on payment of a small sum, the *warrants of attorney* to confess judgment, the *cognovits actionem*, the *judge's orders* to enter up judgment by consent, and the *bills of sale* of personal chattels,[6] which must now be filed in the Court of Queen's Bench within twenty-one days after their respective execution or making; as also the books and indexes relating to these documents, which the officer of the Court is directed to keep.[7] So, all persons, on payment of one-shilling,

[1] 3 Geo. 4, c. 126, §§ 72, 73; 9 Geo. 4, c. 77, § 2.
[2] 7 & 8 Vict., c. 91, § 71.
[3] 18 & 19 Vict., c. 124, § 44, amending § 61 of 16 & 17 Vict., c. 137.
[4] 9 & 10 Vict., c. 74, § 14; id. c. 87, § 5, Ir.
[5] 18 & 19 Vict., c. 120, §§ 61, 185, 198, 199.
[6] 17 & 18 Vict., c. 36, § 3; and c. 55, § 3, Ir.
[7] 3 Geo. 4, c. 39, §§ 1, 3, 5; 6 & 7 Vict., c. 66; 12 & 13 Vict., c. 106, §§ 136, 137.

are at liberty to search the *book kept by the senior Master of the Common Pleas*, which contains an alphabetical list of the persons whose real estate is intended to be affected by judgments of the superior courts, decrees or orders of courts of equity, rules of courts of common law, or orders in bankruptcy or lunacy;[1] as also the "index to debtors and accountants to the Crown," which is kept by the same officer.[2] Subject also to such regulations as may from time to time be made by the Commissioners of the Treasury, every person has a right to search any of the indexes kept at the office for the registration of assurances of lands in Ireland.[3] So, *certificates of naturalisation*, which are enrolled in the Court of Chancery, may, subject to certain regulations made by the Lord Chancellor, be inspected and copied.[4]

§ 1367. The *returns* which surveyors are required to make to the *registrar of metropolitan buildings*, and the awards, certificates, and other documents of the official referees, which are directed to be kept in the office of the said registrar, are open to general inspection at all seasonable times, on payment of a small fee; and the registrar is bound to give, under his hand and seal of office, a copy or extract of any of these documents, to any person demanding it, who is ready to pay for the same.[5] So, every person may, upon payment of a reasonable fee, inspect the register book kept by any registrar of British ships under the Merchant Shipping Act of 1854,[6] as also any of the documents recorded by the registrar-general of seamen.[7] So, any person is entitled to inspect gratis the *register of coalwhippers*.[8] In addition to this long and repulsive string of statutes, many other public Acts, and a vast number of local and personal Acts, contain provisions enabling interested persons to inspect and obtain copies of particular documents.

[1] 1 & 2 Vict., c. 110, § 19; 2 & 3 Vict., c. 11, §§ 3, 8: 3 & 4 Vict., c. 82, § 2. Similar lists kept by the Prothonotary of the Common Pleas at Lancaster may be inspected on the same terms. See 13 & 14 Vict., c. 43, § 24. See also 18 & 19 Vict., c. 15, §§ 2 & 3, as to Courts of Law and Equity in Counties Palatine.

[2] 2 & 3 Vict., c. 11, §§ 8, 9.

[3] 13 & 14 Vict., c. 72, § 52.

[4] 7 & 8 Vict., c. 66, § 9.

[5] 7 & 8 Vict., c. 84, §§ 78, 91.

[6] 17 & 18 Vict., c. 104, § 92.

[7] 17 & 18 Vict., c. 104, § 277.

[8] 14 & 15 Vict., c. 78, § 13.

§ 1368. THE MODE OF PROVING PUBLIC DOCUMENTS must now, in the SECOND PLACE, be considered. And, first, as to *legislative Acts*. It has already been seen that *public statutes* need no proof, being supposed to exist in the memories of all.[1] Still, for certainty of recollection, reference is had to a printed copy, and if the accuracy of such copy be questionable, the Court will consult the Parliament roll.[2] In most of the *local and personal Acts* it was customary prior to the year 1851 to insert a clause, declaring that the Act should be deemed public, and should be judicially noticed; and the effect of this clause was to dispense with the necessity, not only of pleading the Act specially, but of producing an examined copy, or a copy printed by the printer for the Crown.[3] Since the commencement of the year 1851 this clause, however, has been omitted, the Legislature having enacted that every Act made after that date shall be deemed a public Act, and be judicially noticed as such, unless the contrary be expressly declared.[4] The simplest mode of proving those few Acts, whether they be local and personal, or merely private, which, being passed before the year 1851, contain no clause declaring them to be public, or which, being passed since that date, contain an express clause declaring them not to be public, is by producing a copy, which, if it *purports* to be printed by the Queen's printer, need not be proved to be so;[5] or the Act may be proved by means of an examined copy, shown on oath to have been compared with the Parliament roll.[6] Where the Acts are not printed by the printers for the Crown, as is sometimes the case with respect to Acts for naturalising aliens, for dissolving marriages, for inclosing lands, and for other purposes of a strictly personal character, an examined copy, or a certified transcript into Chancery, if there be one,[7] furnishes the regular proof.

§ 1369. Before leaving the subject of legislative Acts, it may be observed, that the *Statutes passed in Ireland prior to the Union* are

[1] Ante, § 5. [2] R. *v.* Jeffries, 1 Stra. 446.

[3] Woodward *v.* Cotton, 1 C. M. & R. 44, 47; Beaumont *v.* Mountain, 10 Bing. 404. These cases explain, and partially overrule, Brett *v.* Beales, M. & M. 421.

[4] 13 & 14 Vict., c. 21, § 7. [5] 8 & 9 Vict., c. 113, § 3, cited ante, § 7.

[6] B. N. P. 225.

[7] Roos Barony, Min. Ev. 145, cited Hubb. Ev. 613.

conclusively proved in any court of Great Britain by producing a copy of them printed and published by the printer for the Crown; and, in like manner, the copies of the statutes of England and of Great Britain, which have been printed and published by the government printer, are receivable as conclusive evidence in any court in Ireland.[1]

§ 1370. It has been already remarked, that the *statute* or *written law* of any *foreign nation* cannot be proved in English courts of justice, by the production of a copy of the law, however well authenticated; but that in all cases it is necessary to call some person, skilled in the foreign law, to prove the existence and meaning of the statute or code on which reliance is placed.[2]

§ 1371. *Acts of state* may be proved in various ways, according to the nature of the document. Thus a *royal proclamation* may be proved, by producing either the original, or a copy purporting to be printed by the printer to the Crown,[3] or an examined copy, or the Gazette in which it has been inserted;[4] for, as before stated,[5] it seems that the Courts are bound to take judicial notice of the Gazette, without any proof whence it came, or by whom it was printed. Again, *British treaties* may be proved, by producing either the originals, or copies exemplified under the Great Seal, or examined copies, or copies coming from the government press; but, in this last case, it may be doubtful whether the Courts would be satisfied, without proof that the copy was actually printed by the printer for the Crown. *Charters, letters-patent,*[6] *grants from the*

[1] 41 Geo. 3, c. 90, § 9. It is presumed that this § would be satisfied by producing a copy which *purported* to be printed by the government printer, without proof that it was actually so printed. The words however, in their strict sense, do not admit of this construction, and the evil is not remedied by the Docum. Evid. Act, 8 & 9 Vict., c. 113, cited ante, § 7. See Woodward *v.* Cotton, 1 C. M. & R. 48.

[2] Ante, §§ 1280, 1281.

[3] 8 & 9 Vict., c. 113, § 3, cited ante, § 7.

[4] R. *v.* Holt, 5 T. R. 436.

[5] Ante, § 13.

[6] As to proof of patents of inventions, see 15 & 16 Vict., c. 83, § 2, and 16 & 17 Vict., c. 115, §§ 4 & 5, cited ante, p. 12, n. 3.

Crown, pardons, and *commissions*, will be most conveniently proved by the production of the originals under the Great Seal, the Privy Seal, or the Royal Sign-manual; but as these are matters of public record,[1] they might also, as it seems, be proved by exemplifications under the Great Seal, or by examined copies.

§ 1372. All *proclamations, treaties, and other acts of state* of any *Foreign State* or of any *British Colony*, may be proved either by examined copies, or by copies *purporting* to bear the seal of the state or colony to which they respectively belong.[2] In one case, where a book was tendered in evidence, which purported to be a collection of treaties concluded by America, and was declared to have been published by authority there, as a regular copy of the archives in Washington; and it was further proposed to prove, by the American minister resident at this court, that the book was the rule of his conduct; Lord Ellenborough rejected the evidence, observing that he would not have admitted a book of Spanish treaties, though proved to have been printed by the King's printer in that country.[3]

§ 1373. The Documentary Evidence Act, as already observed, renders copies of the *Journals* of either House of Parliament admissible in evidence, provided they *purport* to be printed by the printers to either House; and it is not necessary to prove that the copies were in fact so printed.[4]

§ 1374. The *Articles of War*, both in the land and marine service, being emanations respectively from the Crown and the Admiralty under the statute law, must, like public Acts of Parliament, be judicially noticed;[5] but, in order to instruct the Court, a copy, purporting to be printed by the Queen's printer, or, in the case of the marine service, a copy certified under the hand of the Lord High Admiral, or under the hands of any two or more of the commissioners for executing his office, should be produced.[6]

[1] 2 Bl. Com. 346. [2] 14 & 15 Vict., c. 99, § 7, cited ante, § 9.
[3] Richardson *v.* Anderson, 1 Camp. 65 n. *a*.
[4] 8 & 9 Vict., c. 113, § 3, cited ante, §§ 7, 8. [5] Ante, § 5.
[6] R. *v.* Withers, cited by Buller, J., in R. *v.* Holt, 5 T. R. 446. See

§ 1375. As the *Rules, Orders, and Regulations* of the *late Poor-law Commissioners* are expressly declared by the Poor-law Amendment Act of 1834 to be as valid as if they were embodied in that statute,[1] they ought, as it would seem, to be judicially noticed; and the best mode of bringing any of them to the knowledge of courts of justice, is by producing a copy, which is shown to have been printed by the printer for the Crown.[2] They may, however, be proved, by producing either the originals or copies, provided they respectively purport to bear the seal of the Commissioners' Office;[3] or even by producing an examined copy, and showing that it has been compared with the original order, which is also proved to be genuine.[4] The *present Poor-law Commissioners,* who are now collectively known by the name of "The Poor-law Board,"[5] are also empowered to make rules, orders, and regulations; but all such must be under their seal, and purport to be signed by at least two of the commissioners, or by the president and one of the secretaries, except those intended for the guidance or procedure of themselves, or of persons employed by them for the business of their office; and if the *rules be general,* that is, if they are directed to, and affect more than, one union, or if they vary or rescind a general rule, whether they be directed to or affect one or more unions, they must be under seal, and under the hands of *three* or more of the commissioners, of whom the president shall be one.[6] It seems that, by virtue of the Documentary Evidence Act, the signatures need not be proved to be authentic;[7]

1st sect. of the Annual Mutiny Act, and the Annual Marine Mutiny Act, cited ante, p. 4, n. 8. See also 12 & 13 Vict., c. 43, § 1, which directs judicial notice to be taken of the Articles of War for the government of the East India Company's service.

[1] 4 & 5 Will. 4, c. 76, § 42. See also §§ 15—20 of same Act. See, too, 10 & 11 Vict., c. 109, § 18, which provides, that "all lawful rules, orders, and regulations of the Poor-law Commissioners, made before the day on which the commissioners first appointed under this Act shall enter on their office, shall continue in full force and effect until rescinded or varied under the authority of this Act."

[2] See 7 & 8 Vict., c. 101, § 71, cited ante, § 17.

[3] 4 & 5 Will. 4, c. 76, § 3, cited ante, § 6.

[4] See 4 & 5 Will. 4, c. 76, § 18. [5] 12 & 13 Vict., c. 103, § 21.

10 & 11 Vict., c. 109, §§ 7, 14, 15.

& 9 Vict., c. 113, § 1, cited ante, § 7.

and it is expressly enacted in the new Poor-law Act, that if the documents purport to be sealed or stamped with the Commissioners' seal, the genuineness of the seal need not be proved.[1] The orders of the *Irish Poor-law Commissioners*, both late and present, may be proved by producing the originals or copies, purporting to be sealed or stamped with the seal of the board; "but no such order or copy thereof shall be valid, or have any force or effect, unless the same shall be sealed or stamped as aforesaid."[2] The orders, too, of the present Poor-law Commissioners for Ireland must further purport to be signed by at least two of the commissioners, or by the chief commissioner, or, in his absence, by the assistant commissioner; and, in either of the last two cases, they must, if made prior to the 11th of April, 1856,[3] have been countersigned by the secretary to the commissioners.[4]

§ 1376. The judges have promulgated a rule, which must not be lost sight of in any case where an *original record* is required to be produced at the trial. The rule is in these words: "No subpœna for the production of an original record shall be issued, unless a rule of Court or the order of a judge shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order."[5]

§ 1377. The *general records of the realm*, which are placed under the custody of the Master of the Rolls, may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office;[6] and in cases

[1] 10 & 11 Vict., c. 109, § 5.

[2] 1 & 2 Vict., c. 56, § 121; 10 & 11 Vict., c. 90, § 3, Ir.

[3] When the office of secretary was abolished by 19 & 20 Vict., c. 14.

[4] 10 & 11 Vict., c. 90, § 18, Ir.

[5] Reg. Gen., H. T., 1853, r. 32; 1 E. & B. App. ix. See as to former rules on the same subject, Reg. Gen., E. T., 11 Vict., 2 Ex. R. 394; 11 Q. B. 876; and 6 Com. B. 424; and Reg. Gen. 3rd Nov. 1851, 2 L. M. & P. 556.

[6] 1 & 2 Vict., c. 94, § 12, enacts, that "the Master of the Rolls or deputy-keeper of the records may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined

of importance before the House of Lords or elsewhere, permission will be given to one of the assistant keepers to produce the original record.[1]

§ 1378. The next class of public documents to be considered consists of the *records of courts of justice*, and other judicial writings. And, first, as to the *records* of the *superior courts* of law and equity, and the *quasi records* of those courts. The expression "quasi records" will embrace depositions, affidavits, bills, answers, orders, and decrees, filed in Chancery, rules of court, and certain other documents, which, although not strictly records,[2] partake so much of their nature, that they can be proved by means of copies,[3] to the same extent as records, and are subject generally to the same rules of evidence. Indeed, henceforth, for the sake of convenience, the general term "records" will alone be used, and will include all the documents just mentioned. Now, the records of the superior courts may either be proved by the mere production of the *originals*,—or, as this course would be highly inconvenient to the public if generally adopted, since it

and certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record-keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." § 13 enacts, that "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence." [1] See ante, § 1376.

[2] B. N. P. 235. The reason given by Mr. Justice Buller in this passage, why the proceedings in Chancery are not records, is sufficiently amusing. After stating that a record is "a memorial of what is the law of the nation," he adds, "now Chancery proceedings are no memorials of the laws of England, because the *Chancellor is not bound to proceed according to the laws.*" As to rules of court not being records, see R. *v.* Bingham, 3 You. & Jer. 109, 112, 114.

[3] See as to decrees, B. N. P. 234, 235; as to bills and answers, Ewer *v.* Ambrose, 4 B. & C. 25; as to depositions in Chancery, Highfield *v.* Peake, M. & M. 109; as to affidavits, Davies *v.* Davies, 9 C. & P. 252; Garvin *v.* Carroll, 10 Ir. Law R. 323; as to rules of court, Selby *v.* Harris, 1 Lord Raym. 745; Duncan *v.* Scott, 1 Camp. 102.

might lead to the mutilation or loss of valuable documents,—they may also be proved by means of *copies*.[1] Of these, there are *four kinds;* viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court where the record remains; office copies; and examined copies.[2]

§ 1379. One or other of these copies will always be admissible in lieu of the original record, *excepting in two cases:* [3] first, if issue has been joined on a plea or replication of *nul tiel record*, in some cause in a court to which the disputed record belongs;[4] and secondly, if a person is indicted for perjury in any affidavit, deposition, or answer, or for forgery with respect to any record.[5] In either of these cases, the original document must be actually produced. On a trial, too, for perjury, the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved;[6] after which the Court will presume that the oath was duly administered.[7] For the purpose of insuring the production of the original record, application should be made to the court to which it belongs, or to a judge in vacation, who will make the necessary order.[8]

§ 1380. Where an issue is raised as to the *existence of a record*, which does *not belong to the same court*, the proof must be by an

[1] Ante, § 409. Post, § 1436. [2] B. N. P. 226—228.

[3] As to a possible third case, see ante, § 1303. [4] 2 Ph. Ev. 129.

[5] B. N. P. 239; R. *v.* Morris, 2 Burr. 1189; R. *v.* Benson, 2 Camp. 508; R. *v.* Spencer, Ry. & M. 97; Crook *v.* Dowling, 3 Doug. 77; Stratford *v.* Greene, 2 Ball & Beat. 296; Garvin *v.* Carroll, 10 Ir. Law R. 330, per Crampton, J.; Lady Dartmouth *v.* Roberts, 16 East, 340, per Lord Ellenborough and Le Blanc, J. In this last case the judges intimated an opinion, that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. See B. N. P. 13; Purcell *v.* M'Namara, 1 Camp. 200. [6] See cases cited in last note.

[7] R. *v.* Spencer, 1 C. & P. 260, per Abbott, C. J.; R. *v.* Turner, 2 C. & Kir. 732, per Erle, J.

[8] See ante, § 1376; Crook *v.* Dowling, 3 Doug. 77, per Lord Mansfield; Bastard *v.* Smith, 10 A. & E. 214; Bentall *v.* Sydney, id. 164. The application to the Court of Chancery for leave to take an answer off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right. Stratford *v.* Greene, 2 Ball & Beat. 294; Keinan *v.* Boylan, 1 Sch. & Lef. 232.

exemplification under the Great Seal; in order to obtain which, if the record does not belong to the Court of Chancery, a literal transcript of it must be removed thither by certiorari; for that is the centre of all the courts, and there the Great Seal is kept. An exemplification will then be transmitted by mittimus out of Chancery, to the court in which the cause is pending.[1] This seems to be the proper mode of proof, where the existence of a judgment of one of the superior courts is put in issue in any County Court.[2]

§ 1381. When the existence or contents of the record are *not directly in issue*, it may, at common law, be always proved by the second kind of exemplification, though practically recourse is seldom had to this medium of proof, where the record belongs to one of the superior courts. Both species of *exemplifications* are *proved by mere production*, as the judges are bound to take judicial notice of the seals attached to them;[3] and they are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination.[4] Indeed, an exemplification under the Great Seal is itself considered a record of the highest validity.[5]

§ 1382. An *office copy* of a record, by which is meant a copy authenticated by a person intrusted with the power of furnishing copies, is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and is regarded as equivalent to the record itself, when it is tendered as evidence in the *same court*, and in the *same cause;* but at common law, such copy must be proved to be correct, if it be produced, either in another court, or even in the same court in another cause.[6] Whether an issue out of Chancery can be considered as a proceeding in that Court, so that, on the trial at Nisi Prius, office copies of former Chancery records in the same cause may be

[1] B. N. P. 226 b; Hewson *v.* Brown, 2 Burr. 1034.
[2] Winsor *v.* Dunford, 12 Q. B. 603.
[3] Ante, § 6. [4] B. N. P. 226 b, 228. [5] Id.
[6] Den *v.* Fulford, 2 Burr. 1179, per Lord Mansfield; Jack *v.* Kiernan, 2 Jebb & Sym. 231, 237, 238, per Bushe, C. J.; Barron *v.* Daniel, Cr. & Dix, Abr. Cas. 283, per Doherty, C. J.

admissible in evidence, is a question on which the authorities are diametrically opposed;[1] but no doubt seems to be entertained, that on the trial of a cause issuing out of one of the common-law courts, the judge at Nisi Prius will be considered to all intents as acting under the authority of that court, and consequently will be bound to receive all office copies which would be admissible in the cause before the court above.[2]

§ 1383. So strictly has the *general rule rejecting office copies, excepting in the same cause and court*, been enforced, that where an action was brought in the Queen's Bench against a sheriff for a false return to a writ of fieri facias, the Court would not allow the plaintiff to put in office copies of the writ and return, though the original cause was in that court.[3] Where, however, an office copy of an affidavit was admitted, under a judge's order, to be a *true copy*, it was allowed to be used against the party making the admission.[4] It is true that several cases may be cited in which the Courts appear, at first sight, to have relaxed the above rule in favour of office copies of affidavits filed of record,[5] and of answers in Chancery;[6] but, on narrowly examining these authorities, it will be found that the distinction between office and examined copies was not taken, and that the real point disputed in each of the cases was, whether any copy was admissible in lieu of the original.

§ 1384. The rule that office copies are inadmissible, excepting

[1] The negative of this proposition was held by Best, C. J., in Burnand *v.* Nerot, 1 C. & P. 578; the affirmative by Littledale, J., in Highfield *v.* Peake, M. & M. 109.

[2] Jack *v.* Kiernan, 2 Jebb & Sym. 238, per Bushe, C. J.; R. *v.* Jolliffe, 4 T. R. 292, per Buller, J.; Anon., Arm. Mac. & Og. 310, per Brady, C. B.

[3] Pitcher *v.* King, 1 C. & Kir. 655, per Lord Denman.

[4] Davies *v.* Davies, 9 C. & P. 252, per Gurney, B.

[5] Wightwick *v.* Banks, Forrest, 153; Casburn *v.* Reid, 2 Moore, 60; Croke *v.* Dowling, B. N. P. 14. This last case is more fully reported in 3 Doug. 75, as Crook *v.* Dowling, and nothing is there said about the copy being an office copy.

[6] Salter *v.* Turner, 2 Camp. 87; Studdy *v.* Sanders, 2 D. & Ry. 347. In this last case reference is made to Hennell *v.* Lyon, 1 B. & A. 182, as a strictly analogous decision, but there an examined copy was produced.

in the court and cause to which the record appertains, applies only to such copies as are made by an officer having no other authority to make them than a rule of court established for the convenience of suitors; for, *if the officer is bound*, either at common law, or by statute, *to furnish copies*, they will generally be admitted in all courts alike.[1] For instance, a chirograph, which is an office copy of a fine, is admissible as evidence of a fine in all courts, because it was the duty of the officer to deliver such copies to the parties whose titles were concerned;[2] but if it be necessary to show, what is now under almost all circumstances conclusively presumed,[3] namely, that the fine has been levied with proclamations, these cannot be proved by office copies, because the chirographer was not appointed by the statutes to copy the proclamations.[4] Again, the rules of the superior common-law courts may be proved in any court by the production of an office copy, for such copies are given out by the officer in the usual course of his business.[5] So, a document delivered out by the registrar of the Court of Chancery as an order of that court, need not be compared with any book of the orders of the court, but will be regarded in the light of an original.[6]

§ 1385. The Act of 12 & 13 Vict., c. 109, has facilitated the proof of all records and documents belonging to the common-law side of the Court of Chancery, by making office copies admissible in evidence; and after enacting, in § 11,[7] that a seal shall be provided for the Court of Chancery, which shall be called the Chancery Common-law Seal, and shall be judicially noticed, it goes on to enact, in § 13,[8] that every document sealed with this

[1] B. N. P. 229; Black *v.* Lord Braybrook, 2 Stark. R. 12—14; Appleton *v.* Lord Braybrook, 6 M. & Sel. 37—39. See 5 & 6 Will. 4, c. 82, § 4.

[2] B. N. P. 229.

[3] 11 & 12 Vict., c. 70, §§ 1, 3, cited ante, § 63.

[4] B. N. P. 229, 230; Doe *v.* Bluck, 6 Taunt. 485.

[5] Selby *v.* Harris, 1 Lord Raym. 745; Duncan *v.* Scott, 1 Camp. 102, per Lord Ellenborough; Streeter *v.* Bartlett, 5 Com. B. 562, 564; Jack *v.* Kiernan, 2 Jebb & Sym. 233, per Perrin, J. As to the mode of proving the general rules of inferior courts, see post, § 1425.

[6] Mayor of Ludlow *v.* Charlton, 9 C. & P. 242, 246, 247, per Gurney, B.

[7] Cited ante, p. 9, n. 4.

[8] The precise words are as follows:—"And be it enacted that every office

seal, and purporting to be a copy of any record or document of any description, shall be deemed to be a true copy, and shall, without further proof, be admitted in evidence before all courts and persons, in like manner and to the same extent and effect as the original record or document would be admissible, as well for the purpose of proving the contents of such record or document, as of proving that such record or document belongs to the Court of Chancery, but not further or otherwise. Although the language here employed is of the most general character, apparently including the copy of "any record or document of any description," the Legislature obviously intended that the Chancery Common-law Seal should only be attached to copies of such records and documents as belong to the common-law side of the Court of Chancery, and as are filed or deposited in the Petty Bag Office. The Orders in Chancery, made in pursuance of the Act, place this matter in a clear light; for they direct that the Clerk of the Petty Bag is to have the custody of the seal, and is to employ it in sealing such documents as are by the Act authorised to be sealed therewith.

§ 1386. It would be no easy matter to enumerate all the records and documents which are deposited in the Petty Bag Office, and which may now, under § 13 of the Act, be proved by office copies; but among the most important may be mentioned the Parliament pawns, that is, the list of writs issued on calling new Parliaments from the time of Henry VII.; the returns of Members to Parliament from the date of the Restoration; a few qualifications of

copy issued from the Petty Bag Office shall be sealed with the said Chancery Common-law Seal for the time being; and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be admissible and admitted and received in evidence, as well before either House of Parliament as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original record or other document would or might be admissible or admitted or received, if tendered in evidence, as well for the purpose of proving the contents of such record or other document as also proving such record or other document to be a record or document of or belonging to the said Court of Chancery, but not further or otherwise."

Members of Parliament; the Bedford Level decrees; the decrees of Charity Commissioners from the reign of Queen Elizabeth; the commissions and inquisitions of lunacy and escheats from the time of Charles II.; the returns to writs for swearing in Masters Extraordinary of the Court of Chancery, and justices of the peace, and for electing coroners, verderors, and regardors; the returns to writs of scire facias, and a vast number of other writs which have issued from the common-law side of the Court of Chancery;[1] and a considerable number of enrolments of patents and specifications, which, prior to the 1st of January, 1849,[2] were enrolled in the Petty Bag Office.

§ 1387. Among other examples of office copies of the records of the superior courts, which, *by statute*, are *rendered admissible* in all courts, may be mentioned,—first, the *certificates of acknowledgment* of *deeds* by *married women*, which are filed of record in the Court of Common Pleas, and copies of which, purporting to be signed by the officer with whom they are lodged, are receivable as evidence of the acknowledgments to which they respectively relate;[3]—and next, the orders and decisions of the Court of Common Pleas, sitting as a Court of Appeal from the decisions of *revising barristers*, which may be proved by copies purporting to be signed by one of the Masters of the Court.[4]

[1] See 12 & 13 Vict., c. 109, § 14.

[2] From the 1st of January, 1849, till the 1st of October, 1852, all specifications for patents must have been enrolled in the Enrolment Office of the Court of Chancery. See 11 & 12 Vict., c. 94, § 14, and 12 & 13 Vict., c. 119, § 15. They are now filed, instead of being enrolled, under the Patent Law Amendment Act, 1852. See ante, § 1029.

[3] 3 & 4 Will. 4, c. 74, § 88; 8 & 9 Vict., c. 113, § 1, cited ante, § 7. As to what verifying affidavits will be required by the Judges of the Common Pleas, before they will file a certificate of acknowledgment made out of England, see Macqueen on Husb. & Wife, App. 22—34, and cases there collected.

[4] 6 & 7 Vict., c. 18, after providing by § 66, that the judgment of the Common Pleas on the decisions of revising barristers shall be final "in the case upon the point of law adjudicated upon, and shall be binding upon every Committee of the House of Commons appointed for the trial of every election petition," enacts in § 68, "that a copy of any order or decision of the said Court, such copy purporting to be signed by one of the Masters of

§ 1388. Although, in Ireland, the officers of the superior courts are authorised, if not required, by statute,[1] to furnish office copies of the proceedings of such courts, these copies, with one statutory exception, seem to be admissible in evidence only in the same cause and the same court; the judges apparently considering, that the Legislature did not intend to effect such an innovation in the law of evidence, as would be introduced, if office copies of all the records of the superior courts were rendered universally admissible.[2] The exception just stated is founded on the Act of 14 & 15 Vict., c. 57, which, by § 107, enacts that in every proceeding before the court of the assistant barrister, or of the judge of assize upon appeal, an office copy of any judgment, decree, or order, made by or before any court of law or equity in Ireland, certified to be a true copy by the proper officer of such court, shall, upon proof of such officer's handwriting, be deemed and taken as primâ facie evidence of such document. This clause is remarkable, as setting at nought the valuable provisions of the Documentary Evidence Act, so far as relates to the proof of the office copies.

§ 1389. The most usual mode of proving records is by an *examined copy;* and when this course is intended to be adopted, a witness must be produced, who will swear that he has compared the copy tendered in evidence with the original, or with what the officer of the court, or any other person, read as the contents of the record, and that such copy is correct.[3] It is not necessary for the persons examining to exchange papers, and read them alter-

the said Court, shall be sufficient evidence in all cases, without proof of the signature of the said Master, and shall have the like force and effect as any entry made in any list or register of voters," either under that Act, or under the Act of 2 & 3 Will. 4, c. 45. See, as to the corresponding law in Ireland, 13 & 14 Vict., c. 69, §§ 79, 81.

[1] See 7 & 8 Vict., c. 107, § 11, and schedules. See, also for the former law, 1 & 2 Geo. 4, c. 53, §§ 24, 25. [2] Jack *v.* Kiernan, 2 Jebb & Sym. 231.

[3] Reid *v.* Margison, 1 Camp. 469; Gyles *v.* Hill, id. 471, n.; M'Neil *v.* Perchard, 1 Esp. 264; Fyson *v.* Kemp, 6 C. & P. 71; Rolf *v.* Dart, 2 Taunt. 51; R. *v.* M'Donald, Arm. Mac. & Og. 112, per Crampton, J.; R. *v.* Hughes, Cr. & Dix, Cir. R. 13, per Doherty, C. J.; Hill *v.* Packard, 5 Wend. 387; Lynde *v.* Judd, 3 Day, 499.

nately both ways;[1] but it is necessary that the copy should be an accurate and complete copy, and therefore if it contains abbreviations where, in the original, words were written at length, it cannot be received.[2] Moreover, if the record be written or printed in an ancient or foreign character, the witness, who has compared the copy with it, must have been able to read and understand the original.[3] It must also appear in all these cases, that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept. And this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found.[4]

§ 1390. The records or judicial proceedings of the Admiralty[5] and Ecclesiastical Courts,[6] of the Court of Stannaries,[7] and of the Courts of Quarter Sessions, may be proved like those of the superior courts at Westminster, either by producing the originals or by means of exemplifications, whether under the Great Seal or under the seals of the respective courts, which seals require no proof,[8] or by office copies in the same cause and the same court,[9] or by examined copies in any court.[10] Indeed, these modes of proof are generally available with respect to the judgments or other proceedings of all inferior courts of record;[11] and even where the court is not one of record, and where short notes of its proceedings are alone kept, these notes, being considered as public documents, may be proved by examined copies.[12] Where the existence of a record or judgment of any of the inferior common-law courts is put in issue in some cause in the Court of Queen's Bench, the party who has to produce the document questioned, may, instead of applying to the Court of Chancery, as he must have done had the record belonged to the Common Pleas or the

[1] Cases cited in last note. [2] R. v. Christian, C. & Marsh. 388.
[3] Crawford & Lindsay Peer., 2 H. of L. Cas. 534, 544, 545.
[4] Adamthwaite v. Synge, 1 Stark. R. 183, per Lord Ellenborough; 4 Camp. 372, S. C.
[5] See 3 & 4 Vict., c. 65. [6] See 6 & 7 Vict., c. 38, § 14.
[7] See 6 & 7 Will. 4, c. 106, §§ 19, 21. [8] Ante, § 6.
[9] Ante, § 1382. [10] R. v. Hains, Comb. 387, per Holt, C. J.
[11] Id. [12] Id.

Exchequer,[1] move the Court of Queen's Bench for a certiorari; and on the issuing of this writ, a literal transcript of the document, under the seal of the inferior court, will be returned directly into the Queen's Bench, and will be sufficient to countervail the plea denying the existence of the original.[2]

§ 1391. In extending to the records and other judicial proceedings of all inferior courts the above common-law modes of proof, it must not be forgotten that, in a few instances, special *statutes* have been passed with a view of *facilitating the proof*, either of the records or other proceedings of *particular tribunals*, or of *particular records and documents*. These Acts, however, by rendering admissible a convenient species of evidence, do not thereby deprive parties of the right of having recourse to any other mode of proof allowable at common law; or, in other words, the *statutable methods of proof are cumulative*, and *not substitutionary;* since it is a doctrine, founded on common sense, largely sanctioned by authority, and especially applicable where the common law is concerned, that unless the enactment of a new provision clearly indicates an intention by the Legislature to abrogate the old law, both shall be understood to stand together, unless their so doing would be impossible or obviously absurd.[3]

§ 1392. Subject to these observations, a reference may now be made to the Acts in question; and first as to the Bankrupt Law Consolidation Act,[4] which regulates the proof of the proceedings of the *Court of Bankruptcy*.[5] This statute enacts, in § 236, that

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[1] Ante, § 1380.

[2] Woodcraft *v.* Kinaston, 2 Atk. 317, 318, per Lord Hardwicke; Butcher's case, Cro. Eliz. 821.

[3] Escott *v.* Mastin, 4 Moore, Pr. C. R. 130, 131, per Lord Brougham; Northam *v.* Latouche, 4 C. & P. 140, per Tindal, C. J.; R. *v.* Carter, 1 Den. C. C. 65; Edwards *v.* Buchanan, 3 B. & Ad. 788.

[4] 12 & 13 Vict., c. 106. As to the "Bankruptcy (Scotland) Act, 1856," see post, § 1400 A.

[5] The Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict., c. 60, enacts in § 361, that "every petition of bankruptcy, petition of insolvency, schedule, adjudication, petition for arrangement between a debtor and his creditors, appointment of assignees, certificate, deposition, order, document, or other proceeding in bankruptcy or insolvency, or under any such petition

"any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be *sealed with the seal of the court*, or any writing purporting to be a *copy* of any such document, and purporting to be *so sealed*, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof; and *no such document or copy* shall be receivable in evidence *unless* the same *appear to be so sealed, except* where otherwise in this Act *specially provided*." The Act goes on to provide, in the same section, that all commissions,[1] and fiats, and proceedings under the same respectively, which may have been entered of record before the 15th of August, 1832, when the Act of 2 & 3 Will. 4, c. 114, passed, or which purport to have been sealed before the 11th of October, 1849, when this Act commenced, with the seal of the Court of Bankruptcy, and every writing purporting to be a copy of any such document, and to have been so sealed, shall upon the production thereof,—and in the case of any commission, fiat, or proceedings entered of record before the passing

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for arrangement, appearing to be sealed with the seal of the Court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all Courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, without any further proof thereof; provided always, that all commissions of bankrupt, depositions, and other proceedings under the same, which may have been entered of record before the commencement of this Act, and having the certificate of entry thereon, purporting to be signed by the person appointed to enter the same by the Act of the Irish Parliament, 11 & 12 Geo. 3, c. 8, and the Act 6 & 7 Will. 4, c. 14, or his deputy, shall, without proof of the appointment or handwriting of such person, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place."

[1] The word in the Act is "fiats," but by the Interpretation Clause, § 276, this includes "commissions."

of 2 & 3 Will. 4, c. 114, with the certificate thereon, purporting to be signed by the person duly authorised to enter proceedings in bankruptcy, or by his deputy,—be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place.

§ 1393. The only important documents not requiring a seal under the section just cited, are copies of declarations of insolvency, and of minutes of resolutions, where arrangements have been made between debtors and their creditors under the control of the court; and provided these documents respectively purport to be certified by the Chief Registrar of the Court of Bankruptcy, or any of his clerks, as true copies, they are receivable as evidence of such declarations or minutes of resolutions having been filed in the office of the Chief Registrar.[1] If the declaration of insolvency has been filed, as it may be, in a country district, a copy purporting to be certified by the registrar of the district, is now receivable in evidence by virtue of the Bankruptcy Act, 1854.[2] It deserves notice, that copies of declarations of insolvency under the "Irish Bankruptcy and Insolvent Act, 1857," are required to be sealed with the seal of the court, that Act especially providing, that every such copy purporting to be so sealed, and to be certified by a registrar of the court as a true copy, shall be received as evidence of the declaration, and of the same having been filed.[3]

§ 1394. In order that any *certificate of conformity*, granted since the 11th of October, 1849, may discharge the bankrupt from all demands proveable under the bankruptcy, it must be in writing under the seal of the court and the hand of the commissioner; and it must certify in a particular set form[4] that the bankrupt has made a full discovery of his estate and effects, and has in all things conformed, and that, so far as the Court can judge, no reason appears to exist for doubting the truth or fullness of such discovery. The certificate will then, on production, be sufficient evidence

[1] 15 & 16 Vict., c. 77, §§ 2, 6 ; 12 & 13 Vict., c. 106, § 238.
[2] 17 & 18 Vict., c. 119, §§ 16, 17, 19.
[3] 20 & 21 Vict., c. 60, § 363.
[4] See 12 & 13 Vict., c. 106, Sch. Z ; 20 & 21 Vict., c. 60, Sch. O.

of the trading, bankruptcy, fiat, or petition for adjudication, and of all other proceedings that have taken place prior to its being obtained.[1] Every certificate of conformity allowed by any commissioner before the 11th of October, 1849, although not confirmed according to the laws in force before that time, is now made to operate as a discharge of the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat.[2] With respect to *warrants* and *summonses* issued by the Court of Bankruptcy, the former must be under the seal of the court and the hand of one of the commissioners, and the latter must be in writing under the hand of a commissioner, or, in his absence, under the hand of one of the registrars, and under the seal of the court, but in any event, the respective signatures and seals will be judicially noticed.[3]

§ 1395. The records, orders, and proceedings of the Insolvent Debtors' Court may be proved by certified copies, purporting to be signed by the officer in whose custody the same shall be, or his deputy, and to be sealed with the seal of the court. The Act of 1 & 2 Vict., c. 110, which in § 105 contains the above general provision,[4] has occasioned some litigation by enacting in § 46,[5] that a copy of any vesting order, or of any appointment of assignees,—"such copy being *made upon parchment*, and purporting to have the certificate of the provisional assignee of the

[1] 12 & 13 Vict., c. 106, §§ 199, 205; 20 & 21 Vict., c. 60, §§ 144, 148, Ir.

[2] 12 & 13 Vict., c. 106, § 199.

[3] Id. §§ 24, 237. See ante, p. 10, n. 3. As to the Irish law, see 20 & 21 Vict., c. 60, §§ 35, 362.

[4] 1 & 2 Vict., c. 110, § 105, enacts, that "a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said court, shall at all times be admitted in all courts and places whatsoever as sufficient evidence of the same, without any other proof whatever given of the same." See, for the former law, 7 Geo. 4, c. 57, § 76, cited ante, p. 10, n. 4.

[5] See corresponding § 19, of 7 Geo. 4, c. 57, cited ante, p. 10, n. 4; and Doe v. Willetts, 7 Com. B. 709.

said court, or his deputy *appointed for that purpose*, indorsed thereon, and to be sealed with the seal of the said court,"—shall be received as sufficient evidence of such order and appointment respectively having been made, and of the title of the provisional assignee, and of the other assignees respectively, under the same. This language has raised two questions, first, whether a certified copy on *paper* of a vesting order can be received; and, secondly, whether in the event of its being signed by a deputy, his appointment for the particular purpose of making out copies must either be stated on the document or proved in evidence. The judges, by determining that a paper copy is admissible,[1] and that the *special* appointment of a deputy need neither be stated nor proved,[2] apparently consider that the 46th section is rendered nugatory by the 105th.[3] In some cases, persons who are not traders, and traders who owe less than 300*l*., may now petition either the Insolvent Debtors' Court or the County Courts for protection from process, and these petitions, and all proceedings relating thereto, may be proved by producing either the originals purporting to be signed by the commissioner or judge of such respective courts, or copies of them purporting to be so signed.[4]

§ 1396. A simple mode of proving the records and proceedings of the County Courts[5] is established by the statute 9 & 10 Vict., c. 95, which, in § 111, enacts, "that the clerk," now called the registrar,[6] "of every court holden under this Act, shall cause a note of all plaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from

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[1] Hounsfield *v.* Drury, 11 A. & E. 98.

[2] Jackson *v.* Thompson, 2 Q. B. 887, 894.

[3] As to the mode of proving the general rules of the Insolvent Debtors' Court, see post, § 1425.

[4] 10 & 11 Vict., c. 102, §§ 4, 6; 7 & 8 Vict., c. 96, § 37. Before this last Act passed, it was necessary to prove the handwriting of the commissioner to the final order for protection. See 5 & 6 Vict., c. 116, § 10.

[5] As to the mode of proving Civil Bill decrees in Ireland, see and compare 14 & 15 Vict., c. 57, §§ 10, 97, 110, 114, 149, and Alcorn *v.* Larkin, Arm. M. & Og. 367; and Donagh *v.* Bergin, id. 284.

[6] 19 & 20 Vict., c. 108, § 8.

time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk," or registrar, "of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof."[1] It has been held under this section, that the note entered by the Registrar of the County Court in his book cannot be contradicted by any entry made by the judge in his own minute book.[2]

§ 1397. Among the particular judicial documents, the proof of which is facilitated by statute, may be mentioned convictions for any offences against the Factory Acts,[3] or the Act regulating labour in print-works,[4] which must be filed amongst the records of the Quarter Sessions, and copies of which, certified under the hand of the Clerk of the Peace, are receivable in evidence upon any future proceedings under those respective Acts.[5] So, the Act of 12 & 13 Vict., c. 11,—after enacting that offenders convicted of simple larceny shall not be sentenced to penal servitude,[6] unless they have committed that offence under certain specified circumstances of aggravation, or have been twice before summarily convicted under one or other of the following statutes, viz.: 7 & 8 Geo. 4, cc. 29 & 30; 9 Geo. 4, cc. 55 & 56; 10 & 11 Vict., c. 82, and 11 & 12 Vict., c. 59,—goes on, in § 4, to provide, that, "in any indictment against any person who shall have been twice convicted of offences punishable upon summary conviction as aforesaid, it shall be sufficient to state that such person was at certain times and places so twice convicted as aforesaid, without otherwise describing the offences of which such person was so convicted as aforesaid; and a copy of any such conviction, certified by the proper officer of the Court of General or Quarter Sessions to which such conviction shall have been

[1] See ante, § 1395, ad fin. [2] Dews v. Ryley, 2 L. M. & P. 544.
[3] 3 & 4 Will. 4, c. 103; 7 & 8 Vict., c. 15. [4] 8 & 9 Vict., c. 29.
[5] 7 & 8 Vict., c. 15, §§ 67, 68; 8 & 9 Vict., c. 29, §§ 49, 50.
[6] See 16 & 17 Vict., c. 99, and 20 & 21 Vict., c. 3.

transmitted or returned, or proved to be a true copy, shall be sufficient evidence to prove such conviction, and such conviction shall be presumed to be unappealed against unless the contrary be shown." So, the verdicts and judgments in compensation cases under the Lands Clauses Consolidation Act, must be signed by the sheriffs, and deposited with the records of the Quarter Sessions; and the same or copies thereof, signed and certified to be true copies by the Clerk of the Peace, are good evidence in all courts and elsewhere.[1] Under the Customs Consolidation Act, 1855, "the condemnation of goods by any justice as forfeited under the laws relating to the customs may be proved in any court of justice, or before any competent tribunal, by the production of such condemnation purporting to be signed by such justice, or an *examined* copy of the record of such condemnation *certified* by the clerk of such justice."[2]

§ 1398. The modes of authenticating the records and judicial proceedings of *foreign and colonial courts*, including those of the Channel Islands, India, and all other possessions of the British Crown, except Scotland,[3] are now regulated by Lord Brougham's Evidence Act,[4] which in § 7 enacts, that all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or by copies authenticated as follows: that is to say, they must purport either to be sealed with the seal of the court to which the originals belong; or if there be no seal, to be signed by one of the judges of such court, who must also certify to the fact of there being no seal. When these provisions are complied with, no evidence is required either to authenticate the seal, signature, or certificate attached to the copy, or to prove the official character of the judge. If the foreign document, sought to be proved by a

[1] 8 & 9 Vict., c. 18, § 50.

[2] 18 & 19 Vict., c. 96, § 35. The draftsman of this clause had evidently very indistinct notions respecting the distinction between examined and certified copies.

[3] 14 & 15 Vict., c. 99, §§ 18, 19.

[4] 14 & 15 Vict., c. 99, § 7, cited ante, § 9.

copy, does not fall within the language of the section just cited, evidence must be given that it is a public writing deposited in some registry or place, whence, by the law or the established usage of the country, it cannot be removed,[1] and the copy must then be shown to have been duly examined.

§ 1399. Besides the section just referred to, Lord Brougham's Act[2] contains several clauses which greatly facilitate the proof of English documents in Ireland, of Irish documents in England, and of English and Irish documents in the Colonies. Thus, § 9 enacts, that "every document, which by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same." § 10 enacts, that "every document which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in Ireland without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same." § 11 enacts, that "every document which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England

[1] Alivon v. Furnival, 1 C. M. & R. 277, 291, 292; Furnell v. Stackpoole, Milw. Eccl. Ir. R. temp. Radcliffe, 283—286. [2] 14 & 15 Vict., c. 99.

or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British Colonies, or before any person having in any of such colonies, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

§ 1400. In conformity with § 10, as quoted above, it has been held in the courts of equity, that an affidavit purporting to be sworn before a Master Extraordinary of the Court of Chancery in Ireland, was admissible in evidence in this country without proof of the signature or official character of such master.[1]

§ 1400 A. Several clauses are inserted in the "Bankruptcy (Scotland) Act, 1856"[2] to facilitate the proof and to regulate the effect of proceedings under that statute, which may be tendered in evidence before English or Irish tribunals. One very important section, relative to the mode of proving the orders and decrees of Scotch Bankruptcy Law, has been cited in an earlier chapter of this work,[3] and two or three more remain to be noticed. And first, § 47 enacts, that "the warrant granting protection or liberation [to the debtor], or a copy thereof, certified by one of the Bill Chamber Clerks if it is granted by the Lord Ordinary, or by the Sheriff Clerk if it is granted by the Sheriff, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration, and all courts of justice and judges, and all officers and gaolers shall be bound to give effect to such warrant: but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment in meditatione fugæ or ad factum præstandum, or for any criminal

[1] In re Mahon's Trust, 9 Hare, 459.
[2] 19 & 20 Vict., c. 79.
[3] § 174 of the Act, cited ante, § 10 A.

act."[1] Next, §§ 140 and 147 respectively enact, that the deliverance pronounced by the Lord Ordinary or the Sheriff, "discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," "shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland and all her Majesty's other dominions." Then comes § 73, which enacts, that the Act and warrant[2] which is granted by the Sheriff in confirmation of the trustee of a sequestrated estate, and which vests in the trustee the whole property of the debtor,[3] "shall be an effectual title to the trustee to perform the duties hereby imposed on him, and shall be evidence of his right and title to the sequestrated estate for the purposes of this Act; and a copy of such Act and warrant in favour of the trustee, purporting to be certified by the Sheriff-clerk, and to be authenticated by one of the judges of the Court of Session, shall be received in all courts and places within England, Ireland, and her Majesty's other dominions, as primâ facie evidence of the title of the trustee, without proof of the authenticity of the signatures or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or debt due to the bankrupt, and to maintain actions, in the same way as the bankrupt might have done if his estate had not been sequestrated."

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[1] See also § 77 of the Act, which gives powers for renewing the warrant of protection.

[2] The form of the Act and Warrant is given in Sch. (D) of the Statute, and is as follows:—

"*Act and Warrant of Confirmation of the Trustee.*

[Place and date.]

"The sheriff of the county of [insert county] has confirmed and hereby confirms A. B. [name and designation], trustee on the sequestrated estate of C. D. [name and designation]; and the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated, of the said C. D., are transferred and belong to A. B. as trustee for behoof of the creditors of the said C. D. in terms of the 'Bankruptcy [Scotland] Act, 1856;' and the said A. B. has, as trustee aforesaid, in terms of the said Act, full right and power to sue for and recover all estates, effects, debts, and money belonging or due to the said C. D.

(Signed) "C. D., Sheriff Clerk."

[3] § 102.

§ 1401. The Legislature has interposed a special mode of proving some particular documents, when tendered in evidence as coming either from abroad, or from some place out of the jurisdiction of the Court. For instance, the Acts which authorise the apprehension and committal of certain offenders, who have escaped into this country from the colonies, or from France, or America, enact, that copies of the depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies, may be received in evidence of the criminality of the person apprehended;[1] but under the Act relating to colonial offenders, no person may indorse the colonial warrant, for the purpose of authorising the apprehension of any one, until the seal or signature, and official character of the party issuing it, have been proved to him upon oath or affidavit.[2] So, the Acts of 11 & 12 Vict., c. 42, and c. 43,—which contain provisions for apprehending offenders who escape from one part of the United Kingdom to another, or from one county or place in England to another, and which empower any magistrate of the place to which an offender is supposed to have escaped to back the warrant for his apprehension,—appear to render it necessary, as a preliminary step towards giving such magistrate jurisdiction, that proof should be made on oath of the handwriting of the justice issuing such warrant.[3] The Act, too, of 45 Geo. 3, c. 92,[4] which, in addition to other provisions now repealed,[5] enforces the attendance of witnesses in criminal prosecutions, who reside in one part of the kingdom, on subpœnas requiring their appearance in another;—provides, in § 6, that, whenever any certificate of default in a witness to obey a subpœna shall, by virtue of that Act, be required to be acted upon in any part of the United Kingdom, other than that in which the same was originally issued, no court, judge, or justice, shall proceed to enforce or act upon the same, until it shall be proved upon oath, that the seal, signet, and signature upon the same belong

[1] 6 & 7 Vict., c. 34, § 4; id. c. 75, § 2; id. c. 76, § 2.
[2] 6 & 7 Vict., c. 34, § 9. See also, 6 & 7 Vict., c. 75, § 3.
[3] See §§ 11—15 of 11 & 12 Vict., c. 42; and § 3 of 11 & 12 Vict., c. 43.
[4] Cited ante, § 1137.
[5] See 11 & 12 Vict., c. 42, § 34.

respectively to the court, judge, or justice, whose seal, signet, or signature they purport to be. It may be questionable, whether, since the passing of the Documentary Evidence Act, this proof would be required as between England and Ireland;[1] but, as that Act does not extend to Scotland,[2] all certificates, purporting to be sent from that part of the United Kingdom to any other part, must still be proved in the manner pointed out by the statute of Geo. 3.

§ 1402. Again, depositions taken under a writ of mandamus from the Queen's Bench, either in India, respecting misdemeanors committed in that country, or in any place belonging to her Majesty out of the United Kingdom, respecting offences against the Acts for the abolition of the slave trade, may be read as evidence in the Queen's Bench, on the trial of any indictment or information for these respective crimes, if they have been duly taken, and have also been returned to the Queen's Bench closed up and under the seal of two of the judges of the foreign court.[3]

§ 1403. With the view, as it would seem, of facilitating the proof of crimes committed either at sea or abroad, a clause has been inserted in the Merchant Shipping Act, 1854,[4] which evinces, like many other legislative efforts, more zeal than knowledge. The object of the enactment is to render such depositions as may have been taken abroad admissible in evidence, when the witness cannot be found within the jurisdiction of the court where the trial is to take place. The language employed is as follows:— "Whenever in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding,

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[1] 8 & 9 Vict., c. 113, § 1, cited ante, § 7. [2] Id. § 5.

[3] 13 Geo. 3, c. 63, § 40; 6 & 7 Vict., c. 98, § 4; ante, §§ 466—471. As to how far it is necessary to prove that they have been duly taken and returned, see R. v. Douglas, 13 Q. B. 42.

[4] 17 & 18 Vict., c. 104, § 270.

then, upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, or if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence subject to the following restrictions; that is to say, 1. If such deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom: 2. If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession: 3. If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused: Every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom the same is made; and such judge, magistrate, or consular officer shall, when the same is taken in a criminal matter, certify, if the fact is so, that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified; but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the Legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial Legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible."

§ 1404. The Common Law Procedure Act of 1852 contains a remarkable, and, as some persons may consider, an absurd, provision with respect to the mode of proving such affidavits as shall be sworn abroad for the purpose of enabling the courts to direct

proceedings to be taken against defendants resident out of the jurisdiction. After enacting that these affidavits may be sworn before any consul-general, consul, vice-consul, or consular agent appointed by her Majesty at any foreign port or place;—it goes on to provide, that "every affidavit so sworn by virtue of this Act, may be used, and shall be admitted in evidence, saving all just exceptions, *provided* it *purport* to be signed by such consul-general, consul, vice-consul, or consular-agent, *upon proof of the official character* and *signature* of the person appearing to have signed the same."[1]

§ 1405. The above enactment not only violates the principle of the Documentary Evidence Act,[2] but it affords a strange contrast to a clause inserted in the Act for amending the practice of the Court of Chancery, which was passed in the same session as the Common Law Procedure Act. That clause has already been cited in the second chapter of this work;[3] and after regulating the mode of swearing and taking answers, examinations, affidavits, and other documents[4] abroad, it goes on to provide that the seal or signature of the Court, judge, notary, consul, or other person, attached[5] to such documents, shall be *judicially noticed.*

§ 1406. The Bankrupt Law Consolidation Act of 1849[6] contains a clause on the same subject, which differs alike from each of those just mentioned, for it simply enacts, in § 243, that "all affidavits to be made or used in matters of bankruptcy, or in any

[1] 15 & 16 Vict., c. 76, § 23. [2] See ante, § 7.

[3] 15 & 16 Vict., c. 86, § 22, cited ante, § 10.

[4] Under these general words, a power of attorney executed in the British Honduras in the presence of a notary-public, has been proved in a Court of Equity by the production of the notary's certificate under his hand and official seal. Armstrong *v.* Stockham, 24 L. J., Ch., 176, per Stuart, V. C.

[5] In Haggitt *v.* Ineff, 24 L. J., Ch., 120; 5 De Gex, M. & Gord. 910, S. C., the Lords Justices received an affidavit, which was sworn in the United States before, and attested by, a notary-public, and to which was appended a certificate of the British consul at New York, stating that the notary held that office, and that his signature was entitled to credit. See also Savage *v.* Hutchinson, 24 L. J., Ch., 232.

[6] 12 & 13 Vict., c. 106. See also 20 & 21 Vict., c. 60, § 366, Ir.

matter or proceeding under that Act," may,—if taken out of the United Kingdom,—be sworn "before a magistrate and attested by a notary, or before a British minister, consul, or vice-consul." Nothing is said about the proof of the signature, or of the official character of the functionary before whom any such affidavit may purport to have been sworn, and it would seem that no such proof would be deemed necessary by the Court. In one case the Lords Justices admitted an affidavit, which purported to have been sworn at New York before a person described in the jurat as a magistrate, and to which was attached the certificate of a notary, identifying such person as a magistrate of that city.[1]

§ 1406 A. The enactments referred to in the last three sections, so far as they relate to British diplomatic and consular agents, would seem to have been superseded by the more recent Act of 18 & 19 Vict., c. 42. This statute,—extending the provisions of 6 Geo. 4, c. 87, § 20, which empowers consuls-general and consuls to administer oaths and to do notarial acts in the foreign places to which they are appointed,—enacts in § 1, that it shall be lawful "for every British ambassador, envoy, minister, chargé d'affaires, or secretary of embassy or of legation exercising his functions in any foreign country, and for every British vice-consul, acting consul, pro-consul, or consular agent (as well as every consul-general or consul), exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath, or to take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country or place all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and

[1] Ex parte Reid, in re Carne, 22 L. J., Cas. in Bkpty. 4.

effectual, and shall be of like force and effect to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act, respectively, had been administered, sworn, affirmed, had or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature."

§ 1406 B. § 2 enacts, that "affidavits and affirmations, so taken as aforesaid under the said Act of King George the Fourth or this Act, shall and may be received, read, and made use of in and before any court of law or equity, or other judicature whatever in any part of the United Kingdom, and the judges and officers thereof, in or in relation to any action, suit, cause, matter or proceeding in or before any such court or judicature, in like manner, and shall be of the same force and effect as affidavits and affirmations taken in or before such court or judicature, or by any person duly commissioned or authorised by such court or judicature to take such affidavits or affirmations, and shall be filed and dealt with accordingly."

§ 1407. Before any document, whether an original or copy, can be received in evidence of a judicial proceeding, it must in general appear that the record or entry of such proceeding has been *finally completed*. For instance, in order to prove the finding of an indictment, either at the Assizes or Sessions, it will not be sufficient to produce the indictment itself indorsed a true bill, or the minute-book of the Clerk of the Peace, or other officer of the court, in which that fact is entered; but the record must be formally drawn up, and proved in the regular way.[1] So, a judgment, whether interlocutory or final, of one of the superior courts, cannot be proved by producing the minutes, from which it is to be made up, or even the judgment paper or roll, in which the incipitur has been entered by the Master; for such incipitur is merely the instruction for the future judgment, and the judgment is no record till it is actually made up.[2] So, a verdict cannot, in general, be proved by

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[1] R. v. Smith, 8 B. & C. 341; Porter v. Cooper, 6 C. & P. 354; Cooke v. Maxwell, 2 Stark. R. 183; R. v. Thring, 5 C. & P. 507.

[2] Godefroy v. Jay, 3 C. & P. 192; R. v. Bellamy, Ry. & M. 171; Lee

putting in the Nisi Prius record with the *postea* indorsed, but a copy of the judgment rendered upon it must be produced; for it may be that the judgment was arrested, or that a new trial was granted.[1] It is said that this rule does not apply to issues out of Chancery or out of the Court of Admiralty,[2] because in these cases it is not usual to enter up judgment; but still it is apprehended, that, in addition to the record of the issue and of the verdict therein, the decree should be proved, in order to show that the verdict was satisfactory to the court granting the issue.[3] If the record itself be produced from the proper custody, it seems that no objection can be taken to it, on the ground that it has not yet been filed.[4]

§ 1408. In stating that the formal record must generally be proved, it is not meant, as has sometimes been imagined,[5] that the record *must* be enrolled *at full length* on *parchment*. It is true, that in the superior courts this practice has long been established, but in several other courts a more simple, or, it may be, a more slovenly method of making up records, and entering proceedings, prevails. Thus, in the House of Lords itself, the minutes of a judgment on the Journals constitute the judgment itself, and a judgment of that high court may, consequently, be proved, either by an examined copy of the minute,[6] or by producing a copy of the Journal in which it is entered, purporting to be printed by the authorised printer.[7] So, the orders of Quarter Sessions respecting the removal of paupers may be proved by the paper book, in which the proceedings of the court have been entered by the

v. Meecock, 5 Esp. 177; B. N. P. 228; R. *v.* Birch, 3 Q. B. 431, per Lord Denman; Ayrey *v.* Davenport, 2 New R. 474; R. *v.* Robinson, 1 Cr. & Dix, Cir. C. 329. See Fisher *v.* Dudding, 9 Dowl. 872.

[1] B. N. P. 234; Pitton *v.* Walter, 1 Stra. 162; Lee *v.* Gansel, 1 Cowp. 3, per Lord Mansfield; Fitch *v.* Smallbrook, Sir T. Raym. 32; Fisher *v.* Kitchingman, Willes, 367; Gillespie *v.* Cumming, Long. & Town., Ex. Ir. R., 181; Jameson *v.* Leitch, Milw. Eccl. Ir. R. temp. Radcliffe, 688, 689; Holt *v.* Miers, 9 C. & P. 196. This rule seems to have been relaxed in two Nisi Prius cases, Foster *v.* Compton, 2 Stark. R. 364; and Garland *v.* Scoones, 2 Esp. 648. Sed qu. See post, § 1409, as to some exceptions to the rule.

[2] 3 & 4 Vict., c. 65, §§ 11—16.

[3] B. N. P. 234.

[4] R. *v.* Shaw, R. & R. 526.

[5] See 3 Bl. Com. 24; Co. Lit. 260a.

[6] Jones *v.* Randall, 1 Cowp. 17.

[7] 8 & 9 Vict., c. 113, § 3, cited ante, § 7

Clerk of the Peace, or by a copy of it, provided the minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no other record of a more formal character is kept.[1] If, however, this last fact be not proved, or if the jurisdiction of the court do not appear in the minutes, as, for instance, if the caption be omitted, neither the book nor the copy can be received.[2] Again, the proceedings of the ecclesiastical courts may be proved by the minute books in which they are entered, or by copies of such books, if it be shown that in practice they are never reduced into a more formal shape;[3] and the same rule will prevail with respect to the judgments and other proceedings of courts-baron,[4] sheriff's courts,[5] mayor's courts,[6] and other courts of inferior jurisdiction.[7] Indeed, with respect to such courts of inferior jurisdiction as are not courts of record, it seems that their judgments may be proved by the officer of the court, or any other competent person, if it appear that, in fact, no entry of them has been made in any official book.[8] Thus, where a railway Act, after empowering owners of lands to claim compensation from the company, the amount in case of dispute to be settled by a sheriff's jury, directed that the verdicts and judgments thereon should be deposited with the Clerk of the Peace for the county among the records, and should be deemed records, the Court held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the under-sheriff was called for this purpose.[9]

§ 1409. The rule requiring the record or judicial entry to be formally completed, before either the original or a copy can be admitted in evidence, is subject, as it would seem, to *three exceptions.* First, when the object is to show to any particular

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[1] R. *v.* Yeoveley, 8 A. & E. 806.

[2] R. *v.* Ward, 6 C. & P. 366, explained in R. *v.* Yeoveley, 8 A. & E. 818, 819.

[3] Houliston *v.* Smyth, 2 C. & P. 25; R. *v.* Hains, Comb. 337, per Lord Holt; Skin. 584, S. C.

[4] Dawson *v.* Gregory, 7 Q. B. 756.

[5] Arundell *v.* White, 14 East, 218—220.

[6] Fisher *v.* Lane, 2 W. Bl. 834; 3 Wils. 297, S. C.

[7] R. *v.* Hains, Comb. 337; Skin. 584, S. C.

[8] Dyson *v.* Wood, 3 B. & C. 449, 451.

[9] Manning *v.* East. Cos. Rail. Co., 12 M. & W. 237, 243, 249.

court, that some trial has been held or other proceeding has occurred before the same court while sitting under the same commission, a minute of the former proceeding will be admitted in lieu of the record, because, in this case, the formal record cannot be presumed to have been made up.[1] Secondly, the same course will be allowed, where, in consequence of some ulterior proceedings in a cause having been taken, the record cannot, at the time when the evidence is required, have been regularly completed. The case of R. *v.* Browne[2] will illustrate this exception. That was an indictment for perjury on a trial at Nisi Prius, and in order to prove the trial, the Nisi Prius record was tendered. No postea was indorsed upon it, but merely a minute of the verdict in the handwriting of the associate. An objection being taken to this evidence, the Court admitted it, on proof by the associate that a motion for a new trial was pending, and that until that rule was disposed of, the postea could not be indorsed. Perhaps, however, it was unnecessary to prove this last circumstance; for, thirdly, where the object of the evidence is merely to establish the fact that a certain judicial proceeding has taken place, as, for instance, that a trial has been had, a verdict given, or a writ issued, without regard to the facts disputed at the trial, found by the jury, or mentioned in the writ, and irrespective of all ulterior proceedings in the cause, it has been held that the record need not be formally drawn up.[3] Thus, the postea indorsed on the Nisi Prius record will be sufficient evidence of a trial, to let in the testimony of a witness since deceased,[4] or, perhaps, to support an indictment against a witness for perjury;[5] and where the fact that a writ has

[1] R. *v.* Tooke, 25 How. St. Tr. 446—449; recognised in R. *v.* Smith, 8 B. & C. 343; R. *v.* Robinson, 1 Cr. & Dix, Cir. C. 329; R. *v.* Reilly, 1 Ir. Cir. R. 795, per Doherty, C. J.

[2] 3 C. & P. 572; M. & M. 315, S. C. In the last-named report the fact that a new trial had been moved for does not appear.

[3] B. N. P. 234; Pitton *v.* Walter, 1 Stra. 162; Fisher *v.* Kitchingman, Willes, 367; Barton *v.* Dupuy, 1 Martin, N. S. 442.

[4] Pitton *v.* Walter, 1 Stra. 162.

[5] R. *v.* Browne, 3 C. & P. 572; M. & M. 315, S. C.; R. *v.* Coppard, M. & M. 118. See R. *v.* Page, 2 Esp. 649, n.; and R. *v.* Gordon, C. & Marsh. 410, in which case it was held by Lord Denman, that an allegation in an indictment for perjury that judgment was "entered up" in an action, was proved by producing from the judgment office the book in which the

issued is mere matter of inducement, that fact may be proved by producing the writ, though it has not been returned, and is, consequently, not a record.[1] So, when a prisoner was indicted at the Central Criminal Court for perjury committed by him on a trial held at the same court some six months before, the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict, the sentence, and the minutes of the trial as made by the officer, was held to be sufficient evidence of the trial, without the production of the record, or of any certificate of it, either under § 13 of 14 & 15 Vict., c. 99, or under § 22 of 14 & 15 Vict., c. 100.[2]

§ 1410. In proving records, it is sometimes a question of nicety to determine *how much of the proceedings must be given in evidence;* and as the practice in this respect differs widely according to the *object* for which the evidence is tendered, it is difficult to lay down any distinct rule. It may, however, be stated broadly, that where the object is merely to prove the existence of the record in question, that fact may be established by producing the document alone; but if the record be relied upon as proof of certain facts stated therein, or adjudicated thereby, all the proceedings which are necessary, either to render valid, or to explain, the particular document, must, in general, be put in evidence. For instance, if a *decree in Chancery* is offered, merely to prove that it was in fact made, here, as in the case of verdicts,[3] no proof of any other proceeding is required;[4] but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must generally prove, not only the decree, but the bill

inscription was entered. But see R. *v.* Thring, 5 C. & P. 507; and R. *v.* Robinson, Cr. & Dix, Cir. C. 239, where it was held that on an indictment for perjury in a prosecution, the record of the former trial must be made up.

[1] B. N. P. 234.

[2] R. *v.* Newman, 2 Den. 390; 3 C. & Kir. 240, S. C. See post, §§ 1443, 1444.

[3] Ante, § 1409.

[4] Jones *v.* Randall, 1 Cowp. 18; B. N. P. 235; Blower *v.* Hollis, 1 Cr. & Mee. 393; 3 Tyr. 356, S. C., where it was held, that an order for an attachment for not paying costs of an equity suit, was alone primâ facie evidence that a suit had been pending.

and answer upon which it was founded; because, without such proof, it may be impossible to understand the decree, or to ascertain with certainty what disputed questions have been decided by it.[1] Where the bill and answer are fully recited in the decree, this reasoning does not apply; and, consequently, it has more than once been held that, in that case, the production of the decree alone will be sufficient.[2] On one occasion it was strenuously contended, that the depositions referred to in a decree must also be read as part of the record; but the Court ruled otherwise, observing, that it is from the bill and answer only that a court of equity collects the questions in dispute, and that the sole object of referring to the depositions, is to bring the same facts before a court of appeal, if necessary.[3]

§ 1411. Again, *a judgment of the Ecclesiastical Court* cannot be made evidence without producing the libel and answer and the defensive allegations;[4] and on the same principle, if an appeal from such judgment has been heard, the decree of the court of appeal cannot be admitted, without proving that court to have been duly in possession of the suit, by producing the process of appeal, that is, the transcript of the proceedings sent from the court below.[5] The same rules apply to sentences in the Court of Admiralty, and to judgments in courts-baron and other inferior courts.[6] Whether an adjudication by the Insolvent Debtors' Court for the discharge of a prisoner, can be received as evidence of his insolvency, without putting in his petition and schedule, is a question on which the authorities differ;[7]

[1] Blower v. Hollis, 1 Cr. & Mee. 396, per Bayley, B.; Leake v. Marq. of Westmeath, 2 M. & Rob. 397, per Tindal, C. J.; Attwood v. Taylor, 1 M. & Gr. 289, 290, per Lord Abinger.

[2] Wheeler v. Lowth, Com. Dig. tit. Ev. C. 1; Wharton Peer., 12 Cl. & Fin. 301, 302.

[3] Laybourn v. Crisp, 4 M. & W. 320, 326—328; 8 C. & P. 397, 403—406.

[4] Leake v. Marq. of Westmeath, 2 M. & Rob. 394, per Tindal, C. J. This case virtually overrules Stedman v. Gooch, 1 Esp. 6, 8.

[5] Id.

[6] Com. Dig. tit. Ev. C. 1.

[7] In M'Kee v. Farnam, 2 Cr. & Dix, Cir. C. 209, Torrens, J., rejected the adjudication; but in Brennan v. Dillane, Ir. Cir. R., 853, Ball, J., admitted that document without the petition, though he required the pro-

though, on strict principle, such evidence would seem to be inadmissible.

§ 1412. Prior to the alterations in Equity pleading, which were made in 1852, *an answer in Chancery* could not formally be given in evidence without reading the entire bill,[1] unless it were shown that the bill was lost or destroyed;[2] but this rule was seldom rigidly enforced; for, as the statements in the bill could not be considered in the light of admissions,[3] to insist upon their being read looked too much like an attempt to prejudice the cause; and, therefore, in practice, the reading of the interrogatory part of the bill was alone required, and that only when the answer was ambiguous without referring to the questions.[4] The practice here described of course still continues with respect to all bills and answers framed under the old system; but when the pleadings are drawn in the amended form as laid down in the Act of 15 & 16 Vict., c. 86,[5] it seems on principle, that the proper course is to require the interrogatories to be read at the same time as the answer, but to dispense with the reading of the bill, unless it be necessary to show for what specific relief the plaintiff prays.

§ 1413.[6] *Depositions in Chancery*, also, cannot in general be read, without proof of the bill and answer, in order to show that a cause was depending, as well as who were the parties, and what was the subject-matter in issue; for, if no cause were depending, the depositions are but voluntary affidavits; and if there were one, the depositions cannot be read, unless the cause was against the same parties or those claiming in privity with them.[7] Still, the bill and answer, by being so put in, do not

duction of the schedule. This last decision is said to have been followed by Jackson, J., in a later case, id.

[1] Pennell *v.* Moyer, 2 M. & Rob. 98; 8 C. & P. 470, S. C.

[2] Gilb. Ev. 49, 50; Rowe *v.* Brenton, 8 B. & C. 765. [3] See ante, § 786.

[4] Pennell *v.* Meyer, 2 M. & Rob. 98, per Tindal, C. J.; 8 C. & P. 470, S. C.

[5] See §§ 10 & 12. [6] Gr. Ev. § 516, in part.

[7] Laybourn *v.* Crisp, 4 M. & W. 326, per Lord Abinger; Blower *v.* Hollis, 1 Cr. & Mee. 396, Maule argu.; 2 Ph. Ev. 149; B. N. P. 240; Nightingal *v.* Devisme, 5 Burr. 2594.

become evidence to be submitted to the jury, and the opposite counsel has consequently no right to read or refer to them in his address; for the judge only is to look at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit.[1] Moreover, no proof of the bill or answer is necessary, where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness.[2] So, if the Court of Chancery has made an order for the reading of the depositions upon the trial of an issue out of that court, then, upon proof of the order, the depositions will be read without antecedent proof of the bill and answer, provided the witnesses cannot be produced.[3] So, depositions may be read upon proof of the bill alone, if the defendant to the suit is in contempt for not putting in an answer, and has had an opportunity of cross-examining the witnesses, which he has chosen to forego.[4]

§ 1414. Where a party relies upon depositions taken under the old law, he must read the interrogatories as well as the answers, unless he can prove that the former are lost or destroyed,[5] and it seems that he must also read as part of his case the whole depositions, including the cross-interrogatories and answers thereto.[6] Depositions under the new system are not open to these niceties; for the oral examination of the witness is taken down by the examiner, "not ordinarily by question and answer, but in the form of a narrative."[7] The party, however, who seeks to put these depositions in evidence, whether in equity or at common law, must remember that to render them valid, they must be written throughout by the examiner himself,[8] and authenticated by his signature, and they must also be transmitted by him to the

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[1] Chappell v. Purday, 14 M. & W. 303.

[2] Highfield v. Peake, M. & M. 109.

[3] Palmer v. Lord Aylesbury, 15 Ves. 176; Corbett v. Corbett, 1 Ves. & B. 336, 339—341.

Cazenove v. Vaughan, 1 M. & Sel. 4; Carrington v. Cornock, 2 Sim. 567.

Rowe v. Brenton, 8 B. & C. 765.

Temperley, v. Scott, 5 C. & P. 341, per Tindal, C. J.

15 & 16 Vict., c. 86, § 32.

Stobart v. Todd, 23 L. J., Ch., 956, per Kindersley, V. C.

Record Office of the Court of Chancery, to be there filed.[1] Proof therefore, must be forthcoming that these regulations have been complied with, if the admissibility of the depositions be disputed; but the original document need not be produced, for it will suffice to put in evidence either examined copies of them, or copies certified as true copies by the officer to whose custody the originals are intrusted.[2]

§ 1415. *Depositions* taken under special *commissions* cannot, in general, be read without proof of the commission and return. Nay, it has more than once been contended that it is necessary in these cases to go further, and to put in the order, the bill and answer, or the other judicial proceedings, upon which the commission has been founded. Lord Ellenborough, however, on one occasion expressed a contrary opinion at Nisi Prius;[3] and Chief Baron Pollock more recently is said to have held, that the commission must be taken primâ facie to have issued regularly, and consequently that the production of the order was not requisite.[4] This ruling, which is certainly convenient, has moreover been partially sanctioned, though not distinctly recognised by the Court of Queen's Bench.[5]

§ 1416. Doubts have also been entertained respecting the legal mode of transmitting the depositions, &c., to the courts, and it has not yet been finally determined whether the commissioners may avail themselves of the Post-office, or whether the documents must be sent by a special messenger.[6] In one case the commission was sent by post, addressed to certain commissioners in Newfoundland. After a few months a sealed packet was brought to the Master's office by a person unknown, and was found to contain the commission, the return to it, and

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[1] 15 & 16 Vict., c. 86, § 34.
[2] Id.; 14 & 15 Vict., c. 99, § 14, cited post, § 1437; Reeve *v.* Hodson, 10 Hare, App. xix., per Wood, V. C.
[3] Bayley *v.* Wylie, 6 Esp. 85. As to examinations under writs of mandamus, see ante, §§ 466—471, 1402.
[4] Entwistle *v.* Dent, cited arguendo in 11 Q. B. 1002.
[5] Greville *v.* Stulz, 11 Q. B. 997, 1004—1006.
[6] See Cox *v.* Newman, 2 Ves. & B. 168, 170.

the examinations of the witnesses, signed by the persons named as commissioners. The handwriting of the commissioners being proved, as also the fact that they were living at Newfoundland, the Court held that sufficient evidence had been given to establish the validity of the return.[1]

§ 1417. Subject to the observations contained in the two foregoing sections, *examinations* or *depositions* taken by virtue of the English Act, 1 Will. 4, c. 22, or the Irish Act, 3 & 4 Vict., c. 105, may be read in evidence, saving all just exceptions, if they purport to be certified under the hand of the Commissioners, Master, Prothonotary, or other person taking the same,[2] and if it further appears to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or incapable from permanent sickness or other permanent infirmity to attend the trial.[3]

§ 1418. The mode of proving the *examination* of prisoners, and the *informations* or *depositions* of witnesses, which have respectively been taken by justices or coroners in *criminal* cases, has already been explained in previous parts of this work.[4]

§ 1419.[5] The return to *inquisitions* post mortem, and other inquisitions, surveys, extents, and the like, cannot *strictly*[6] be proved, without reading the commissions on which they depend;[7] unless in cases of general concernment, when the commission will be regarded as a thing of such public notoriety as not to require proof.[8]

§ 1420. To prove an *award*, it is not only necessary to pro-

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[1] Simms *v.* Henderson, 11 Q. B. 1015.

[2] 8 & 9 Vict., c. 113, § 1, cited ante, § 7.

[3] 1 Will. 4, c. 22, § 10; 3 & 4 Vict., c. 105, § 75, Ir.; cited ante, § 478.

[4] As to examinations, ante, §§ 811—823; as to depositions, ante, §§ 447—460.

[5] Gr. Ev., § 515, in part.

[6] As to when this rule will be relaxed, see post, § 1423.

[7] Evans *v.* Taylor, 7 A. & E. 617; 3 N. & P. 174, S. C; B. N. P. 228; Newburgh *v.* Newburgh, 3 Bro. P. C. 553; Hubb. Ev. 589, 590.

[8] Sir Hugh Smithson's case, per Lord Hardwicke, cited B. N. P. 228, 229.

duce and prove the due execution of that instrument, but the submission to reference must also be proved; for otherwise the authority of the arbitrator to decide the question between the parties does not appear.[1] If the submission be by a written agreement, its execution by all the parties, including the party relying upon it, must be strictly proved;[2] and that too, though it has been made a rule of court, pursuant to one of its terms;[3] but if the arbitrator has been appointed by any rule of court, judge's order, or order of Nisi Prius, in any action,[4] then, on proving the award, and producing the rule or order of reference, a sufficient primâ facie case will be made out; and it will not be necessary to show, by producing the record in the original action, or otherwise, what specific matters were actually referred.[5] If the submission contain a power to appoint an umpire, or to enlarge the time for making the award and such power be acted upon, proof must be given of the instrument by which the umpire was appointed, or the time enlarged; and a mere recital in the award will not be evidence of these facts;[6] neither can the appointment be proved by showing that the umpire had undertaken the duties belonging to his office, and had actually signed the award.[7] As the executing an award is a judicial act, proof should be given in all cases where more than one arbitrator is appointed, that the signing by the joint arbitrators took place in the presence of each other;[8] or if, under the terms of reference, the award is to be good although it be executed by a less number than all the arbitrators, still it must be shown that the arbitrator who has not signed the instru-

[1] Ferrer v. Oven, 7 B. & C. 427; 1 M. & Ry. 222, S. C.; Antram v. Chace, 15 East, 209; Brazier v. Jones, 8 B. & C. 124.

[2] Cases cited in last note.

[3] Berney v. Road, 7 Q. B. 79.

[4] 3 & 4 Will. 4, c. 42, § 39; 3 & 4 Vict., c. 105, § 63, Ir.

[5] Gisborne v. Hart, 5 M. & W. 50; recognised in Dresser v. Stansfield, 14 M. & W. 828, per Parke, B.

[6] Still v. Halford, 4 Camp. 19, per Lord Ellenborough; Davis v. Vass, 15 East, 97.

[7] Still v. Halford, 4 Camp. 19.

[8] Stalworth v. Inns, 13 M. & W. 466; Wright v. Graham, 3 Ex. R. 131; Eads v. Williams, 4 De Gex, M. & Gord. 674; Lord v. Lord, 5 E. & B. 404.

ment has had notice to attend the execution, and has omitted or refused to do so.[1]

§ 1421. In the case of *awards by public officers*, a less rigid amount of proof will sometimes be deemed sufficient, and in the absence of evidence of any subsequent usage inconsistent with the award, the maxim, omnia præsumuntur ritè esse acta, will be held to apply.[2] Thus, where commissioners, named in an inclosure act, and authorised thereby to stop up roads, provided two justices made an order to that effect, published their award, which recited such order, and by which they stopped up a certain public footpath, it was held, that this recital was sufficient primâ facie evidence of a valid order, on proof of an ineffectual search for the instrument itself, and that the award must be taken to have been rightly made, unless some proof of enjoyment inconsistent with it could be given.[3] The principle of this case has been carried much further by the Legislature; for awards made and confirmed by commissioners under several of the more recent General Inclosure Acts, are[4] rendered *conclusive* evidence of a compliance with those Acts, and of all necessary notices and consents; and everything specified in such awards are binding and conclusive on all persons.[5]

§ 1422. Several other Acts relieve parties who rely on particular judicial documents, from the necessity of proving the antecedent proceedings, on which the validity of the documents depends. One example has already been given in the case of a bankrupt's certificate,[6] and another in the case of depositions in bankruptcy.[7]

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[1] White v. Sharp, 12 M. & W. 712; Wright v. Graham, 3 Ex. R. 134, per Parke, B.; In re Beck & Jackson, 1 Com. B., N. S., 695.

[2] R. v. Haslingfield, 2 M. & Sel. 558; Doe v. Gore, 2 M. & W. 321; Doe v. Mostyn, 12 Com. B. 268; Heysham v. Forster, 5 M. & Ry. 277. As to when such awards may be proved by certified copies, see post, pp. 1293—1295.

[3] Manning v. East. Cos. Rail. Co., 12 M. & W. 237.

[4] 6 & 7 Will. 4, c. 115; 3 & 4 Vict., c. 31; 8 & 9 Vict., c. 118; 9 & 10 Vict., c. 70; 10 & 11 Vict., c. 111; 11 & 12 Vict., c. 99.

[5] See 3 & 4 Vict., c. 31, § 1; and 8 & 9 Vict., c. 118, §§ 104, 105, 157. See 17 & 18 Vict., c. 104, § 173, as to submissions to, and awards by, Shipping Masters.

[6] Ante, § 1394.

[7] Ante, § 461.

§ 1423. In proving *ancient* records, the strict rules of evidence are sometimes relaxed. Thus, a document, purporting by its contents to be an exemplification of a commission issued by Queen Elizabeth, and produced from the proper place of deposit, has been allowed to be read, without any evidence of its being a true copy, though no seal was affixed to it, and the state of the parchment was such as to render it impossible to say whether the Great Seal had ever been appended.[1] So, ancient depositions may be read without putting in the interrogatories,[2] or the bills and answers to which they relate,[3] or the commissions under which they were taken,[4] if it be proved that search has been made for these documents, and that they cannot be found; and on the like proof, answers may, it seems, be received in evidence, though the bills be not forthcoming. So, ancient extents, surveys, or returns to inquisitions, which come from the proper custody, and which bear internal evidence of having been taken under due authority, have sometimes been admitted, especially when they were tendered as evidence of reputation, though the commissions on which their legality depended could not be found.[5] Where, however, such documents contain no internal evidence of authenticity, they cannot be read, unless the commissions be produced from the proper depository;[6] neither can they then, if there appears to have been any excess of authority, or any other irregularity in the proceedings, sufficiently serious to render them not only voidable but void.[7] Whether a record be ancient or modern, it is of course allowable, after proof of its loss or destruction, to show its contents, as in the case of any other document, by secondary evidence.[8]

[1] Mayor of Beverley *v.* Craven, 2 M. & Rob. 140, per Alderson, B.

[2] Rowe *v.* Brenton, 8 B. & C. 765. [3] Byam *v.* Booth, 2 Price, 234, n.

[4] Bayley *v.* Wylie, 6 Esp. 85, per Lord Ellenborough.

[5] Rowe *v.* Brenton, 8 B. & C. 747—750; 3 M. & Ry. 133, S. C.; Doe *v.* Roberts, 13 M. & W. 520, 531, 533; Vicar of Kellington *v.* Trinity College, 1 Wils. 170; Alcock *v.* Cook, cited 2 Ph. Ev. 149, n. 1; Anderston *v.* Magawley, 3 Bro. P. C. 588; Gabbett *v.* Clancy, 8 Ir. Law R. 299.

[6] Evans *v.* Taylor, 7 A. & E. 617; 3 N. & P. 174, S. C. See Duke of Beaufort *v.* Smith, 4 Ex. R. 450.

[7] Vaux Barony, Min. Ev. 67; Powis Barony, cited Cruise on Dign. c. 6, § 60; Leighton *v.* Leighton, 1 Stra. 308; Hubb. Ev. 590.

[8] Ante, § 398, et seq.

§ 1424. Before leaving the subject of judicial proceedings, it is necessary to advert to certain documents, which, though emanating from courts of justice, are not records, or such proceedings, as to be capable of being primarily proved by means of copies. First, *writs and warrants*, until they are returned, must be proved by actual production, though after their return, they become matters of record, and are, consequently, proveable by copies.[1] When writs of summons and writs of execution have been renewed under the Common Law Procedure Act, 1852,[2] the fact of renewal may be proved by the production of the respective writs, provided they purport to be marked with the seal of the court, showing them to have been renewed according to the Act.[3] Next, an *order or certificate of a judge*, if not indorsed on a record, cannot, it seems, be proved by a copy, but the original must be produced, when the Courts will judicially notice the signature, if it purport to be that of one of the equity or common-law judges of the Superior Courts at Westminster.[4] A judge's order may also be proved by the rule making it a rule of court.[5]

§ 1425. With respect to the *general rules* and regulations of *inferior courts*, some doubt exists as to the mode of proof. In one case, where it appeared that the Insolvent Debtors' Court had ordered the printing and circulation of its rules for the guidance of its officers, Lord Tenterden admitted one of these printed copies

[1] B. N. P. 234. If the writ is the gist of the action it must be returned, id. As to inhibitions, citations, monitions, &c., arising out of appeals to the Privy Council from decisions of the Admiralty or Ecclesiastical Courts, see 6 & 7 Vict., c. 38, § 9.

[2] 15 & 16 Vict., c. 76, §§ 12, 124.

[3] § 13 is in these words: "The production of a writ of summons purporting to be marked with the seal of the court showing the same to have been renewed according to this Act, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes." § 125 is as follows:—"The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal, showing the same to have been renewed according to this Act, shall be sufficient evidence of its having been so renewed." The Irish Act 16 & 17 Vict., c. 113, contains in §§ 30 & 142, similar provisions.

[4] 8 & 9 Vict., c. 113, § 2, cited ante, § 7.

[5] Still *v.* Halford, 4 Camp. 18, per Lord Ellenborough.

as primary evidence, though the original rules under the seal of the court were kept at the court, and no proof was given that the copy produced had been compared with them.[1] In another case, however, where an officer of the same court produced what purported to be a printed copy of the rules of the court, and stated that he had obtained it from the clerk of the rules, and that he was in the habit of distributing similar copies as authentic documents, the Court rejected the copy, as the witness could not otherwise vouch for its authenticity, and no evidence was offered that these printed rules had ever been sanctioned by the Court.[2]

§ 1426. The *probate* of a will is a copy of that instrument under the seal, either of the Ecclesiastical Court, or, since the 11th of January, 1858, of the Court of Probate, which copy is attached to a certificate, stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein.[3] This document,—which, in the event of the will being proved in solemn form of law, can only be granted after satisfactory evidence has been furnished to the Court of adequate capacity on the part of the testator, of testamentary intention untainted by fraud, and of due execution,[4]—constitutes the title-deed of the executor, without which his character cannot be recognised, and with which it cannot in general be impugned, in any court of law or equity.[5]

§ 1427. The primary mode of proving a probate is by producing either the document itself, when due notice will be taken of the seal,[6] or the Act-book, or register from the Court of Probate,[7]

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[1] Dance v. Robson, M. & M. 294.

[2] R. v. Koops, 6 A. & E. 198. In this case, Dance v. Robson was not cited.

[3] Toller on Ex. 58.

[4] Jones v. Goodrich, 5 Moo. P. C. R. 19, 21, per Dr. Lushington.

[5] Toller on Ex. 74, 75; Allen v. Dundas, 3 T. R. 125; Keynes v. Duke of Wellington, 9 Beav. 579, 599, 601. As to the jurisdiction of the Court of Probate to grant probate in the case of a married woman's will, made in pursuance of a power, see Barnes v. Vincent, 5 Moo. P. C. R. 201, cited post, § 1521. See also Ward v. Ward, 11 Beav. 377.

[6] Kempton v. Cross, Rep. temp. Hardw. 108; ante, § 6.

[7] Cox v. Allingham, Jac. Rep. 514. So, the revocation of probate may

containing an entry that the will has been proved, and probate granted, or even a certified or examined copy of such book or register.[1] If, indeed, as was formerly the practice in some of the inferior spiritual courts,[2] no Act-book, or other separate record of the granting of probates has been kept, but on the will itself a memorandum has been indorsed, stating that the executor has proved it, and that the probate has passed the seal; then, on proof of such former practice, and on production of the will with such indorsement, the title of the executor will be sufficiently established, without accounting for the non-production of the probate.[3] But under no other circumstances will the original will be admitted, either by a court of law or equity, as evidence of title to *personal* property.[4] In the event of the probate being lost or destroyed, it seems that it *may* be proved by an examined copy;[5] but in such case the practice of the Court of Probate,[6]—like that which used to prevail in the spiritual courts,—is to grant either an exemplification, or a certified copy of the entry of the Act-book or register, in which the grant of probate is recorded.[7]

§ 1428. The granting *administration*, which, like the granting

be proved by the Act-book; R. *v.* Ramsbottom, 1 Lea. C. C. 25, n. See ante, § 395.

[1] Davis *v.* Williams, 13 East, 232; R. *v.* Phillpott, 2 Den. 308, per Talfourd, J.; Dorrett *v.* Meux, 15 Com. B. 142; 14 & 15 Vict., c. 99, § 14, cited post, § 1437.

[2] For instance, the Bishop's Courts at Winchester and Wells, 7 A. & E. 240, 243.

[3] Doe *v.* Mew, and Doe *v.* Gunning, 7 A. & E. 240; 2 N. & P. 260, S. C. See also Gorton *v.* Dyson, 1 B. & B. 219; 3 B. Moore, 558, S. C.

[4] Pinney *v.* Pinney, 8 B. & C. 335; R. *v.* Barnes, 1 Stark. R. 243, per Le Blanc, J.; Stone *v.* Forsyth, 2 Doug. 707.

[5] R. *v.* Haines, Skinn. 584, per Lord Holt; Hoe *v.* Nelthorpe, 3 Salk. 154; 1 Lord Raym. 154, S. C., nom. Hoe *v.* Nathrop.

[6] 20 & 21 Vict., c. 77, § 69, enacts, that "an official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act." The fees fixed by the Rules are sixpence for every folio of seventy-two words of office copy, and an additional fee of £1 for "every office copy of will *under seal* of the Court." See also 20 & 21 Vict., c. 79, § 74, Ir.

[7] Shepherd *v.* Shorthose, 1 Stra. 412. See post, § 1437.

of probate, is the act of the Court of Probate, may be proved by producing either the letters of administration under the seal of the court,[1] or the Act-book or register containing a record of the grant, or an exemplification, or an examined or a certified copy of such record, or an official certificate of the grant;[2] and either of these kinds of proof will be admissible as primary evidence.[3]

§ 1429.[4] The next class of public writings to be considered consists of *official registers*, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally, because they are made under the sanction of an oath of office, or, at least, under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses.[5]

§ 1430. To render any document admissible in evidence as an *official register*, it must be one which the *law requires to be kept for the public benefit*. Thus a book produced from the office, now abolished,[6] of the Secretary of Bankrupts, in which entries were made of the allowance of certificates, has been rejected, as it was not kept by order of the Lord Chancellor, nor were the entries

[1] The seal will be judicially noticed, ante, § 6.

[2] See 20 & 21 Vict., c. 77, § 69, cited ante, p. 1270, n. 6. See also 20 & 21 Vict., c. 79, § 74, Ir.

[3] Kempton v. Cross, Rep. temp. Hardw. 108, 109; Elden v. Keddell, 8 East, 187; Davis v. Williams, 13 East, 232. See ante, § 395; and post, § 1437.

[4] Gr. Ev., § 483, in great part.

[5] 1 St. Ev. 230.

[6] 15 & 16 Vict., c. 77, § 1.

made by any person in the course of his official duty.[1] In like manner, a register of attendance kept by the medical officer of a union for the inspection of the guardians, in obedience to a rule of the Poor-law Commissioners, has been held inadmissible; no credit being given to the officer in respect of the entries, but the book being merely intended as a check upon himself.[2] So, Lord Denman has refused to admit the register of shipping kept at Lloyd's.[3] So, a report stating the burthen of a foreign ship, and the number of the crew, which was made by the master to the authorities at the Custom-House, and was there filed, has been rejected, when tendered in evidence as a public document to prove the burthen of the ship; and the same fate has befallen a certificate filed at the Custom-House, which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage. In neither of these cases did it appear that the documents had been prepared by any official personage in the discharge of a public duty.[4] So, the registers and records of baptisms and marriages formerly performed at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and in certain other places, are inadmissible, on the ground that they were not compiled under public authority.[5] So, a marriage register kept by a clergyman in Ireland, prior to the 31st of March, 1845, when the Irish Marriage Act came into operation, has, for a similar reason, been rejected.[6] So, a Jewish register of circumcision, kept at the great synagogue in London, has been rejected, though it was proved that the entries in it were in

[1] Henry v. Leigh, 3 Camp. 499.

[2] Merrick v. Wakley, 8 A. & E. 170.

[3] Freeman v. Baker, 5 C. & P. 482. For a description of this book, see Kerr v. Shedden, 4 C. & P. 531, note *a*. In Bain v. Caso, 3 C. & P. 496; and in Abel v. Potts, 3 Esp. 242, this book was admitted; in the first-named case, to prove that the coast of Peru was in a state of blockade at a particular time, and in the other, as evidence of the capture of a vessel. See also Richardson v. Mellish, 2 Bing. 241, per Best, C. J.

[4] Huntley v. Donovan, 15 Q. B. 96.

[5] Read v. Passer, 1 Esp. 213; 1 Pea. R. 303, S. C.; Doe v. Gatacre, 8 C. & P. 578. These registers are now deposited in the office of the Registrar-General, pursuant to the Act of 3 & 4 Vict., c. 92, §§ 6, 20, which Act, however, does not render them receivable in evidence.

[6] Stockbridge v. Quicke, 3 C. & Kir. 305, per Parke, B.

the handwriting of a deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the book.[1] So, the birth, marriage, or burial register of a Wesleyan or other dissenting chapel will be rejected, unless it has been deposited in the office of the Registrar-General, and entered in his list pursuant to the provisions of the Act of 3 & 4 Vict., c. 92.[2]

§ 1431. The same rule prevails with respect to *foreign* and *colonial registers;* that is, copies of such registers will be admissible, only on proof that they are required to be kept, either by the law of the country to which they belong,[3] or by the law of this country. In the absence of such proof, a copy of a baptismal register in Guernsey,[4]—a copy of a certificate of baptism by the chaplain of a British minister at a foreign court,[5]—a copy of the marriage register kept in the Swedish ambassador's chapel at Paris,[6] prior to the 28th of July, 1849,[7]—and a copy of the book kept at the British ambassador's hotel in Paris, wherein the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him,[8]—have been rejected. But on the other hand, an examined copy of a marriage register in Barbadoes has been admitted, it appear-

[1] Davis *v.* Lloyd, 1 C. & Kir. 275, per Lord Denman and Patteson, J. But see observations on this case, ante, § 633.

[2] Whittuck *v.* Waters, 4 C. & P. 375; Newham *v.* Raithby, 1 Phillim. 315; Ex parte Taylor, 1 J. & W. 483. As to the Act, see ante, § 1354, and post, p. 1283, n. 4.

[3] See Perth Peer., 2 H. of L. Cas. 865, 873, 874, 876, 877.

[4] Huet *v.* Le Mesurier, 1 Cox, 275. On this case Dr. Lushington observes that the evidence was rejected, "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and that by ancient custom a register was required to be kept there, different considerations might have applied to the case. * * * I am of opinion, that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country." Coode *v.* Coode, 1 Curt. 766.

[5] Dufferin Peer., 2 H. of L. Cas. 47.

[6] Leader *v.* Barry, 1 Esp. 353.

[7] When the Act of 12 & 13 Vict., c. 68, for facilitating the marriage of British subjects in foreign countries, passed.

[8] Athlone Peer., 8 Cl. & Fin. 262.

ing that by the law of that colony such register was kept.[1] In America, authenticated copies of foreign registers are receivable in evidence.[2]

§ 1432.[3] It is also deemed essential to the official character of these books, that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed.[4] Thus, a minister's entry of a baptism, which took place before he had any connexion with the parish, and of which he received information from the clerk, is inadmissible; as is also the private memorandum made by the clerk who was present at the ceremony.[5] The Court, however, will not reject an entry in a parish register, merely because it was not made contemporaneously, or because it was made or sanctioned by the incumbent, on information received from some other person; for it will be presumed that the incumbent, however he got his information, had satisfied himself of the fact before he authorised the entry. Thus, an entry in a parish book, which was kept at the parish church, of a burial in the workhouse cemetery within the parish, has been received in evidence, though it appeared that the incumbent sanctioned the entries on the faith of statements made by others, and not from his personal knowledge of the burials.[6]

§ 1433. It may here be advisable to *enumerate* some of the books which the *law will recognise as official registers*, or public documents. Of this description are parish registers;[7] the registers of births, marriages, and deaths, made pursuant to the Registration Act;[8] the register of marriages in Ireland;[9] the registers of marriages abroad, as kept by British consuls since the 28th of July, 1849;[10] the registers and certificates of Indian marriages,

[1] Coode *v.* Coode, 1 Curt. 755, 766, 767, per Dr. Lushington.
[2] Kingston *v.* Lesley, 10 Serg. & R. 383, 389.
[3] Gr. Ev., § 485, as to first five lines.
[4] Doe *v.* Bray, 8 B. & C. 813; Walker *v.* Wingfield, 18 Ves. 443. [5] Id.
[6] Doe *v.* Andrews, 15 Q. B. 756. [7] Doe *v.* Barnes, 1 M. & Rob. 386.
[8] 6 & 7 Will. 4, c. 86. [9] 7 & 8 Vict., c. 81, §§ 52, 71.
[10] 12 & 13 Vict., c. 68.

as delivered to the Registrar-General since the 1st of January, 1852;[1] certain non-parochial registers deposited in the office of the Registrar-General, by virtue of the Act of 3 & 4 Vict., c. 92;[2] the books of baptisms, marriages, and burials in India, deposited at the India-House;[3] the lists of passengers transmitted by the captains of ships in the India trade to the Court of Directors, in pursuance of an Act of Parliament;[4] the deposit and transfer books of the East India Company,[5] and of the Bank of England;[6] the rolls of Courts Baron;[7] land-tax assessments;[8] Poor Law valuations in Ireland;[9] vestry books;[10] bishops' registers and chapter-house registers;[11] terriers;[12] the books kept at public

[1] 14 & 15 Vict., c. 40, § 22, enacts, that "the certificates which shall be delivered to the Registrar-General of Births, Deaths, and Marriages, in England, under this Act, or under any laws or regulations to be made thereunder, shall be kept in the general register-office, in the same manner, and indexes thereof shall be made, and searches permitted, and copies thereof, sealed or stamped with the seal of the General Register-Office, shall be given, in the like manner as by the Act of 6 & 7 Will. 4, c. 86, is provided concerning the certified copies (kept in such office under the said Act) of the registers of births, deaths, and marriages, in England; and every certified copy, purporting to be sealed or stamped with the seal of the said General Register-Office, of any such certificate delivered to the said Registrar-General under this Act, or under such laws or regulations, shall be received as evidence of the marriage to which the same relates, without further proof of such certificate, or of any entry therein."

[2] See ante, p. 1216, n. 2, as to what these registers consist of; and post, p. 1283, n. 4, as to the conditions on which they are receivable in evidence.

[3] Rep. of 1838, by Comm. to inquire into the state of non-parochial registers, p. 13.

[4] Richardson *v.* Mellish, 2 Bing. 204. See 3 & 4 Will. 4, c. 93, § 3.

[5] 2 Doug. 593, n. 3.

[6] Mortimer *v.* M'Callan, 6 M. & W. 58.

[7] B. N. P. 247; Doe *v.* Askew, 10 East, 520.

[8] Doe *v.* Seaton, 2 A. & E. 178, per Patteson, J.; Doe *v.* Arkwright, id. 182, n., per Lord Denman; R. *v.* King, 2 T. R. 234; Doe *v.* Cartwright, Ry. & M. 62; 1 C. & P. 218, S. C.

[9] Swift *v.* M'Tiernan, 11 Ir. Eq. R. 602, per Brady, Ch.; Welland *v.* Lord Middleton, id. 603, per Sugden, Ch.

[10] R. *v.* Martin, 2 Camp. 100.

[11] Arnold *v.* Bp. of Bath and Wells, 5 Bing. 316; Coombs *v.* Coether, M. & M. 398; Humble *v.* Hunt, Holt, N. P. R. 601.

[12] B. N. P. 248; 1 St. Ev. 239.

prisons;[1] the books of the Master's office;[2] the log-books and muster-books of Her Majesty's ships, and even official letters lodged at the Admiralty;[3] lists of convoy;[4] the books of the Sick and Hurt-office;[5] the official log-books kept by the masters of merchant ships;[6] poll-books for the election of members of Parliament;[7] the books which contain the official proceedings of corporations, and matters respecting their property, if the entries are of a public nature;[8] the books and other official papers kept at the Custom-House,[9] at the office of Inland Revenue,[10]—which includes what were formerly the Excise,[11] and the Stamp-offices,[12]—at the Post-office, and at the Register-offices of merchant seamen,[13] of joint-stock companies,[14] including banking companies,[15] and of copy-right;[16] and in short, the official documents belonging to all other public offices. It will presently be seen, when the proof of public documents by examined or certified copies is discussed,[17] that this list might be much enlarged; but, in order to avoid repetition, no other instances are here given.

§ 1434. The most satisfactory mode of proving official registers and other public documents of a like nature, is by *producing* the

[1] Salte *v.* Thomas, 3 B. & P. 188; R. *v.* Aickles, 1 Lea. C. C. 391.

[2] Merrick *v.* Wakley, 8 A. & A. 172, per Lord Denman.

[3] D'Israeli *v.* Jowett, 1 Esp. 427; Watson *v.* King, 4 Camp. 275; R. *v.* Fitzgerald, 1 Lea. C. C. 20; R. *v.* Rhodes, id. 24; Barber *v.* Holmes, 3 Esp. 190. Most of these documents are now lodged at the Record Office. See ante, § 1338.

[4] Richardson *v.* Mellish, 2 Bing. 241, per Best, C. J.

[5] Wallace *v.* Cook, 5 Esp. 117.

[6] 17 & 18 Vict., c. 104, §§ 280—287.

[7] Mead *v.* Robinson, Willes, 422; R. *v.* Hughes, cited, id.; R. *v.* Davis, 2 Str. 1048; 6 & 7 Vict., c. 18, §§ 93—96; 13 & 14 Vict., c. 69, §§ 99—102, Ir.

[8] Marriage *v.* Lawrence, 3 B. & A. 142; R. *v.* Mothersell, 1 Stra. 93; Thetford's case, 12 Vin. Abr. 90, pl. 16; Warriner *v.* Giles, 2 Stra. 954; id. 1223, n. 1.

[9] Johnson *v.* Ward, 6 Esp. 48; Tomkins *v.* Att.-Gen., 1 Dow, 404; Buckley *v.* U. S., 4 Howard, S. Ct. R. 258.

[10] 12 & 13 Vict., c. 1, § 6.

[11] Puller *v.* Fotch, Carth. 346; R. *v.* Grimwood, 1 Price, 369.

[12] See 6 & 7 Will. 4, c. 76, § 8, cited post, p. 1290, n.

[13] 17 & 18 Vict., c. 104, §§ 271, 277, cited post, p. 1288, n. 1.

[14] 19 & 20 Vict., c. 47, § 106, r. 5.

[15] 20 & 21 Vict., c. 49, § 2.

[16] 5 & 6 Vict., c. 45, § 11, cited ante, § 1357, n. 4; and 7 & 8 Vict., c. 12, § 8.

[17] See post, §§ 1438, 1440.

books or documents themselves, and showing that they come from the proper *repository*.[1] In some few cases this is the *only legitimate mode of proof*. Thus, the books of companies subject to the provisions of the Companies Clauses Consolidation Act, in which are entered the proceedings of the directors, of the committees of directors, and of the meetings of the company, and each entry in which must purport to be signed by the chairman of the meeting, cannot be proved by copies, however authentic;[2] neither can the books of the proceedings of companies, to which the Joint-stock Companies Act of 1856 applies, be proved by copies, but the books themselves must be produced, when, if the entry sought to be read purports to be signed by the chairman of the meeting, it will be received as primâ facie evidence.[3] So, the orders and other documents which have proceeded from the now abolished[4]

[1] Atkins *v.* Hatton, 2 Anst. 387; Armstrong *v.* Hewett, 4 Price, 216; Pulley *v.* Hilton, 12 Price, 625; Swinnerton *v.* Marq. of Stafford, 3 Taunt. 91. See ante, § 402, et seq.; and § 594, et seq.; and Croughton *v.* Blake, 12 M. & W. 208, as to the repository.

[2] 8 & 9 Vict., c. 16, § 98, enacts, that "the directors shall cause notes, minutes, or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the order and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books, to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors; and every such entry shall be signed by the chairman of such meeting; and such entry so signed, shall be received as evidence in all courts, and before all judges, justices, and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors or members of committee respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proved." The Act of 13 & 14 Vict., c. xxxiii., called "The Railway Clearing Act, 1850," contains, in § 18, a precisely similar clause with respect to entries made in the books of the Clearing Committee.

[3] 19 & 20 Vict., c. 47, § 40, enacts, that "the company shall cause minutes of all resolutions and proceedings of general meetings of the company to be duly entered in books, to be from time to time provided for the purpose, and any such minute as aforesaid, if signed by any person purporting to be the chairman of such meeting, shall be receivable in evidence in all legal proceedings; and until the contrary is proved, every general meeting in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly held and convened."

[4] 14 & 15 Vict., c. 64, § 1.

commissioners of railways, must, it seems, be proved by the production of the originals purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body;[1] and the same law would appear to extend to all documents relating to railways, which now emanate from the Board of Trade, and which must purport to be signed by one of the secretaries or assistant secretaries of the Board, or by some officer appointed by the Board to sign such documents.[2]

§ 1435. It is also apprehended that all documents relating to merchant shipping, which are issued by the Board of Trade, must be proved by the production of the originals; for the Merchant Shipping Act of 1854[3] contains no provision for rendering copies of such papers admissible in evidence, but merely enacts, in § 7, that "All documents whatever purporting to be issued or written by or under the direction of the Board of Trade, and purporting either to be sealed with the seal of such Board, or to be signed by one of the secretaries or assistant secretaries to such Board, shall be received in evidence, and shall be deemed to be issued or written by or under the direction of the said Board, without further proof, unless the contrary be shown." Again, the minutes of proceedings of the Metropolitan Board of Works, which are rendered admissible in evidence by the Act of 18 & 19 Vict., c. 120, provided they purport to be signed by any two of the members present, must be themselves produced;[4] and a similar rule applies to the books containing

[1] 9 & 10 Vict., c. 105, § 4, enacts, that "the commissioners of railways shall cause a seal to be made for the purposes of their commission, and all orders and other documents proceeding from the said commissioners, and purporting to be sealed or stamped with the seal of the said commissioners, and signed by two or more of the said commissioners, shall be received as evidence of the same respectively in all courts, and before all justices and others, without any further proof thereof."

[2] 14 & 15 Vict., c. 64, § 3.

[3] 17 & 18 Vict., c. 104.

[4] § 60 enacts, that "entries of all proceedings of the Metropolitan Board of Works, and every such district board, and of any such vestry, with the names of the members who attend such meeting, shall be made in books to be provided and kept for that purpose, under the direction of the board or vestry, and shall be signed by the members present, or any two of them; and all entries purporting to be so signed shall be received as evidence, without proof of any meeting of the board or vestry having been duly con-

entries of all the orders and proceedings of the commissioners of public baths, which may be read as evidence, if they purport to be signed by any two commissioners.[1] So, in criminal proceedings, the non-parochial registers deposited with the Registrar-General, must, in order to be evidence, be produced to the Court.[2] So, the register of coal-whippers cannot be proved by a copy;[3] neither, as it would seem, can the daily books of public prisons.[4]

§ 1436. To the above list might be added several other books and documents of a semi-public nature, which are rendered admissible in evidence by the statute law; but still, as a general rule, this strictness of proof is not now required; and indeed, the public inconvenience that would follow the removal of *books of general concernment*, has been felt to be so great, as to justify, and in some cases to compel, the introduction of secondary evidence.[5] Such books belong to a particular custody, from which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary for the purpose of identifying it, or of determining some question arising upon the original entry, or of correcting an error, which has been duly ascertained.

vened or held, or of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the board or vestry, or of the signature of any person by whom any such entry purports to be signed, all which matters shall be presumed until the contrary be proved."

[1] 9 & 10 Vict., c. 74, § 13, enacts, that "all orders and proceedings of the commissioners shall be entered in books to be kept by them for that purpose, and shall be signed by the commissioners, or any two of them, and all such orders and proceedings so entered and purporting to be so signed, shall be deemed to be original orders and proceedings; and such books may be produced and read as evidence of all such orders and proceedings, upon any appeal, trial, information, or other proceeding, civil or criminal, and in any court of law or equity whatsoever."

[2] 3 & 4 Vict., c. 92, § 17, cited post, p. 1284, n. 1. As to what these registers contain, see ante, p. 1216, n. 2.

[3] 14 & 15 Vict., c. 78, § 13, enacts, that "in all courts, and before any justices of the peace, and upon all occasions whatever, the entries made and contained in the register of coalwhippers shall be received in evidence, and shall be deemed sufficient proof of all matters and things therein registered and contained, without *any further proof than the production of such register.*"

[4] Salte *v.* Thomas, 3 B. & P. 190, 191, per Lord Alvanley.

[5] Mortimer *v.* M'Callan, 6 M. & W. 67, per Lord Abinger.

As, therefore, these books are, in general, not removable at the call of individuals, and as, moreover, being interesting to many persons, they might be required as evidence in different places at the same time, it has become a common law axiom of almost universal application, that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy.*[1] So anxious are the judges not to break in upon this rule, founded as it is on public convenience, that even though the original document be in court, they will not require its production, but will admit the copy, provided its authenticity be established.[2]

§ 1437. Now, an *examined copy*, duly made and sworn to by a competent witness, has ever been considered as "authentic," within the meaning of the above axiom;[3] but the Legislature has recently provided a more simple mode of proof, namely, by the production of a *certified copy*. The enactment by which this salutary change in the law has been effected, is contained in § 14 of Lord Brougham's Evidence Act of 1851,[4] and is in the following words:—"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to a person applying at a reasonable time for the

[1] Lynch *v.* Clerke, 3 Salk. 154, per Holt, C. J.; 2 Doug. 593, n. 3; R. *v.* Hains, Comb. 337; Hoe *v.* Nathrop, 1 Lord Raym. 154.

[2] Marsh *v.* Collnett, 2 Esp. 665, per Lord Kenyon. See § 74, ante, as to an analogous rule, in not requiring a subscribing witness to an *ancient* deed or will to be called, even though present in court.

[3] See R. *v.* Mainwaring, 26 L. J., M. C., 10; 7 Cox, C. C. 192; 1 Dear. & Bell, 132, S. C.

[4] 14 & 15 Vict., c. 99.

same, upon payment of a reasonable sum for the same, not exceeding four-pence for every folio of ninety words." In conformity with this section, the Clerk of Records and Writs will be ordered by a court of equity to furnish certified copies of any bills, answers, and depositions which may be in his custody, and which are required to be used on the trial of a cause.[1]

§ 1438. Among the public books and documents, the contents of which, in the absence of the originals, are now proveable under the enactment just cited either by examined or by certified copies, may be mentioned the following;—parish registers;[2] the deposit and transfer-books of the Bank of England,[3] and of the East India Company;[4] the books of the Customs, of the Office of Inland Revenue,[5] and of the Post-office;[6] the rolls of Courts Baron;[7] assessments of land-tax;[8] Poor Law valuations in Ireland;[9] the books of entry, records, deeds, instruments, writings, maps, plans, and other official papers deposited in the office of land revenue records and enrolments;[10] perhaps, the Middlesex registry of deeds;[11] the

[1] Reeve *v.* Hodson, 10 Hare, App. xix, per Wood, V. C.

[2] Doe *v.* Barnes, 1 M. & Rob. 386. In re Porter's trusts, Wood, V. Ch., held that an extract from a parish register, signed by the *curate* of the parish, was admissible. The same point was ruled by the Lords Justices in re Hall's estate, 22, L. J., Ch., 177, though that case is erroneously reported as a decision to the contrary in 2 De Gex, M. & Gord. 748; 9 Hare, app. 1, p. xvi, S. C. See 52 Geo. 3, c. 146.

[3] Breton *v.* Cope, 1 Pea. R. 30; Marsh *v.* Collnett, 2 Esp. 665; Mortimer *v.* M'Callan, 6 M. & W. 58.

[4] 2 Doug. 593, n. 3; Doe *v.* Roberts, 13 M. & W. 532, per Parke, B.

[5] 12 & 13 Vict., c. 1, § 6.

[6] Mortimer *v.* M'Callan, 6 M. & W. 68, per Lord Abinger; Fuller *v.* Fotch, Carth. 346.

[7] B. N. P. 247. Examined copies of court-rolls are admissible, though they are not the copies delivered to the tenant of the estate; Breeze *v.* Hawker, 14 Sim. 350.

[8] R. *v.* King, 2 T. R. 234. Those in the Record Office must be proved by certified copies, see ante, § 1377.

[9] Swift *v.* M'Tiernan, 11 Ir. Eq. R. 602, per Brady, Ch.; Welland *v.* Lord Middleton, id. 603, per Sugden, Ch.

[10] Doe *v.* Roberts, 13 M. & W. 520; 2 Will. 4, c. 1, §§ 15, et seq.; 7 & 8 Vict., c. 89.

[11] Collins *v.* Maule, 8 C. & P. 502, per Tindal, C. J.; Doe *v.* Kilner, 2 C. & P. 289.

Act-book and registers in the registry of the Court of Probate;[1] probably the official log books kept by the masters of British ships in the manner directed by the Merchant Shipping Act of 1854;[2] the books of baptisms, marriages,[3] and deaths in India which are deposited in the India House;[4] the registers of marriages kept by British consuls abroad prior to the 28th of July, 1849;[5] and the rules of savings-banks, and government annuity societies, deposited with the commissioners for the reduction of the national debt.[6]

§ 1439. As the section of Lord Brougham's Act, quoted above,[7] refers only to such documents as are not proveable by means of copies under any other statutable provision, it becomes necessary to enumerate the principal public registers and documents, certified copies of which are receivable in evidence, by virtue of some enactment having special reference to them. And here it must be recollected, that the mode of proof afforded by these particular statutes has been much simplified by the Documentary Evidence Act of 1845; and that provided the certified copies respectively *purport* to be duly signed or sealed, or otherwise authenticated

[1] See Davis *v.* Williams, 13 East, 232; Dorrett *v.* Meux, 15 Com. B. 142. Entries in this book may also be proved by an exemplification; ante, § 1427.

[2] 17 & 18 Vict., c. 104, §§ 280—287.

[3] As to Indian marriages solemnised since the 1st Jan., 1852, see 14 & 15 Vict., c. 40, §§ 21, 22, cited ante, § 1433.

[4] Rep. of 1838, by Commiss. appointed to inquire into the state, &c. of non-parochial registers, p. 13.

[5] 12 & 13 Vict., c. 68, § 28, enacts, among other things, that "all marriages, both or one of the parties being subjects or a subject of this realm, which, before the 28th of July, 1849, have been solemnised according to any religious rites or ceremonies, or contracted per verba de præsenti in any foreign country or place, and *registered* by or under the authority of any British consul-general, consul, or vice-consul exercising his functions within such country or place, *the signatures of the parties being written in the register*, shall be deemed and held to be as valid in the law and cognisable in the like manner, as if the same had been solemnised within Her Majesty's dominions with a due observance of all forms required by law."

[6] 7 & 8 Vict., c. 83, § 19. "The copy of such rules deposited with the said commissioners, or a true copy thereof, examined with the original, and proved to be a true copy, shall be received as evidence of such rules respectively in all cases."

[7] Ante, § 1437.

in the manner pointed out by statute, they will in almost every case be now admitted in evidence, without proof of the seal, the signature, or the official character of the party certifying.[1]

§ 1440. The following list will, it is hoped, be found practically useful, as it contains a reference to the principal documents which are proveable by means of *certified copies under particular Acts* of Parliament.[2] The registers of births, marriages, and deaths, made pursuant to the Registration Act;[3] the non-parochial registers of births, baptisms, marriages, deaths, and burials, which are deposited in the office of the Registrar-General, and certified extracts from which are admissible, under certain regulations as to notice &c., in all civil proceedings,[4] though in criminal cases the original

[1] 8 & 9 Vict., c. 113, § 1; cited ante, § 7.

[2] As to when certified copies of enrolments of instruments are admissible in evidence, see post, §§ 1465—1468.

[3] 6 & 7 Will. 4, c. 86, § 38, enacts, that "the Registrar-General shall cause to be made a seal of the said register office, and the Registrar-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and *all certified copies of entries purporting to be sealed or stamped* with the *seal* of the said *register office* shall be *received* as *evidence* of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy, purporting to be given in the said office, shall be of any force or effect, which is not sealed or stamped as aforesaid." See also §§ 35, 36, cited ante, p. 1214, n. 5, which authorise the clergyman, superintendent registrar, and other officers, to give certified copies of the *local registers*; but as the Act contains no provision for making such copies evidence, it may be doubtful whether they would be admissible, were it not for the Act of 14 & 15 Vict., c. 99, § 14, cited ante, § 1437. See R. *v.* Mainwaring, 26 L. J., M. C., 10; 7 Cox, C. C. 192; 1 Dear. & Bell, 132, S. C.

[4] 3 & 4 Vict., c. 92, § 9, enacts, that "the Registrar-General shall certify all extracts which may be granted by him from the registers or records deposited, or to be deposited, in the said office, and made receivable in evidence by virtue of the provisions herein contained, by causing them to be sealed or stamped with the seal of the office; and all extracts, purporting to be stamped with the seal of the said office shall be received in evidence in all cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained."

§ 10 enacts, that "every extract granted by the Registrar-General from any of the said registers or records, shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the general register office under this Act; and the production

register must be produced;[1] the registers of the marriages of British subjects in foreign countries, which, since the 28th of July,

of any of the said registers or records from the general register office, in the custody of the proper officer thereof, or the production of any certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the general register office under this Act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence."

§ 11 enacts, that "in case any party shall intend to use in evidence on the trial of any cause in any of the *courts of common law*, or on the hearing of any matter which is not a criminal case, at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence at such trial or hearing, if the Judge or Court shall be of opinion that such service has been made in sufficient time before such trial or hearing, to have enabled the opposite party to inspect the original register or record, from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided."

§ 12 enacts, that "in case any party shall intend to use in evidence on such trial or hearing any original register or record (instead of such certified extract), he shall nevertheless, within a reasonable time, give to the opposite party notice of his intention to use such original register or record in evidence, and deliver to such opposite party a copy of a certified extract of the entry or entries, which he shall intend to use in evidence."

§ 13 enacts, that "in case any party shall intend to use in evidence on any examination of witnesses, or at the hearing of any cause, in any *court of equity*, any extract, certified as hereinbefore mentioned, he shall, ten clear days at the least before publication shall pass in any cause, where no commission has issued for the examination of the witnesses of the party intending to give such evidence, or where such commission shall issue, then seven clear days at the least before the opening of such commission, deliver to the clerk or clerks in court of the opposite party or parties a notice in writing of his intention to use such certified extract in evidence, on the examination of witnesses or at the hearing of a cause (as the case may be),

[1] § 17 enacts, that "in all criminal cases, in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the Court the original register or record."

1849, have been kept by British consuls, and certified copies of which are annually transmitted through one of the Secretaries of State to the Registrar-General;[1] the register books kept under the provisions of the Statute passed in 1854 for the better registration of births, deaths, and marriages in Scotland;[2] the

and shall at the same time deliver to the clerk or clerks in court of the opposite party or parties a copy or copies of such extract, and of the certificate thereof, and thereupon such certificated extract shall be received in evidence: Provided that at the hearing of the cause the service of such certified copy and notice be admitted or proved by affidavit."

§ 14 enacts, that "in case any party shall intend to use in evidence, on such examination or hearing in any court of equity, any original register or record (instead of such certificated extract), he shall nevertheless, within the number of days hereinbefore respectively mentioned, deliver to the clerk or clerks in court of the opposite party or parties a notice of his intention to use such original register or record in evidence, together with a copy of a certified extract of the entry or entries which he shall intend to use in evidence."

§ 15 enacts, that "in case any party shall intend to use in evidence, upon any petition, motion, or other interlocutory proceedings in any court of equity or in the Master's office, any extract certified as hereinbefore mentioned, he shall produce to the Court or Master (as the case may be) an extract, certified as hereinbefore mentioned, accompanied by an affidavit stating the deponent's belief that the entry or entries in the original register or record is correct and genuine."

§ 16 enacts, that "in case any party shall intend to use in evidence in any *Ecclesiastical Court*, or in the High Court of *Admiralty*, any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from the parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record: Provided always, that the judge of the court, on cause shown by any party to the suit (or of his own motion when the proceedings are *in pœnam*), may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

§§ 18 & 19 authorise the making of rules to regulate the practice as to the admission of these registers, but it does not seem that any such rules have ever been made.

[1] 12 & 13 Vict., c. 68, §§ 11, 12, 18.

[2] 17 & 18 Vict., c. 80, § 58, enacts, that "every extract of any entry in the register books to be kept under the provisions of this Act, duly authenticated and signed by the Registrar-General, if such extract shall be from the registers kept at the general registry office, or by the registrar, if from any parochial or district register, shall be admissible as evidence in all parts of

register of irregular Scotch marriages;[1] the register of marriages in Ireland, deposited in the general register office, at Dublin;[2] letters patent, specifications, disclaimers, memoranda of alterations, and all other documents recorded and filed in the office of the Commissioners of Patents of Inventions, or in the office of the Court of Chancery appointed for the filing of specifications, which are proveable by printed or manuscript copies or extracts certified and sealed with the seal of the commissioners;[3] the poll-books for the election of members of parliament, deposited with the Clerk of the Crown in Chancery, which may be proved by office copies issued by such clerk or his deputy;[4] the documents kept by the registrar of joint-stock or banking companies, copies or extracts from which, certified under the hand of the registrar or assistant-registrar, and sealed with the seal of office, are receivable as primâ facie evidence of the matters therein contained in all legal proceedings;[5] the reports of inspectors appointed under the Joint Stock Companies Act, 1856, which are proveable by copies authenticated by the seal of the Company whose affairs have been inspected;[6] the book kept at the Hall of the Stationers' Company, wherein are registered the proprietorships and assignments

her Majesty's dominions, without any other or further proof of such entry." As the Documentary Evidence of 1845 does not extend to Scotland, it would seem to be still necessary to prove the signatures and official characters of the persons signing these extracts. See ante, § 7.

[1] 19 & 20 Vict., c. 96, § 2, enacts, in substance, that any certified copy of the entry of any irregular marriage in the Scottish register of marriages, shall, if signed by the registrar, be received in evidence of such marriage, and of the residence in Scotland required by the Act, in all courts in the United Kingdom and dominions thereunto belonging. The signature of the registrar seems to require proof. See preceding note.

[2] 7 & 8 Vict., c. 81, §§ 52, 71. This last section is the same as § 38 of 6 & 7 Will. 4, c. 86, cited ante, p. 1283, n. 3, excepting only that it is confined to marriages.

[3] 16 & 17 Vict., c. 115, § 4, cited ante, p. 12, n. 3.

[4] 6 & 7 Vict., c. 18, § 94 enacts, that "office copies, issued by the said Clerk of the Crown or his deputy, of such poll-books shall be taken in evidence in all courts of law, in actions for bribery or personation, or for any other purpose whatsoever." See also §§ 93, 95, 96. The Irish law is the same; see 13 & 14 Vict., c. 69, § 100.

[5] 19 & 20 Vict., c. 47, § 106, rr. 4, 5, & 8; 20 & 21 Vict., cc. 14 & 49.

[6] 19 & 20 Vict., c. 47, § 52.

of copyright in books, and in dramatic and musical pieces, whether printed or in manuscript, and licences affecting such copyright;[1] the registrations, entries, drawings, prints, and documents kept in the office for the Registration of Designs, which are proveable by copies bearing the seal of office;[2] the registers of British ships, and all declarations made under the Merchant Shipping Act of 1854, with respect to the ownership, measurement, and registry of British ships, which documents are respectively proveable either by the production of the originals, or by examined copies, or by copies purporting to be certified under the hand of the registrar or other person having the charge of the originals;[3]

[1] 5 & 6 Vict., c. 45, § 11, cited ante, p. 1220, n. 4; and 7 & 8 Vict., c. 12, § 8.

[2] 13 & 14 Vict., c. 104, § 14, enacts, that "every copy of any registration, entry, drawing, print, or document delivered by the registrar of designs to any person requiring the same shall be signed by the said registrar, and sealed with his seal of office; and every document sealed with the said seal, purporting to be a copy of any registration, entry, drawing, print, or document, shall be deemed to be a true copy of such registration, entry, drawing, print, or document, and shall, without further proof, be received in evidence before all courts in like manner and to the same extent and effect as the original book, registration, entry, drawing, print, or document would or might be received if tendered in evidence, as well for the purpose of proving the contents, purport, and effect of such book, registration, entry, drawing, print, or document, as also proving the same to be a book, registration, entry, drawing, print, or document, of or belonging to the said office, and in the custody of the registrar of designs." § 12 enacts that the original documents in the office shall not be removed in order to be produced in court without a judge's order; and § 13 empowers any judge to order copies to be furnished for the purpose of being used as evidence.

[3] 17 & 18 Vict., c. 104, § 107, enacts that "every register of, or declaration made in pursuance of the second part of this Act in respect of any British ship, may be proved in any court of justice, or before any person having by law or by consent of parties authority to receive evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original; which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each such certified copy; and every such register or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to receive evidence a primâ facie proof of all the matters contained or

the lists and other documents recorded in the General Register and Record Office of Seamen, copies of which certified by the registrar-general of seamen, are admissible in evidence as fully as the originals;[1] the rules of friendly societies, of building societies,[2] and of industrial and provident societies,[3] which are proveable by copies purporting to be signed by the registrar;[4] the special rules established in any coal mine or colliery, which

recited in such register when the register or such copy is produced, and of all the matters contained in or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced." See 14 & 15 Vict., c. 99, § 12; and 18 & 19 Vict., c. 91, § 15. This last § enacts, that "the copy or transcript of the register of any British ship, which is kept by the chief registrar of shipping at the custom-house in London, or by the registrar-general of seamen, under the direction of her Majesty's Commissioners of Customs or of the Board of Trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript."

[1] 17 & 18 Vict., c. 104, § 277, enacts, that "all shipping masters and officers of customs shall take charge of all documents which are delivered or transmitted to or retained by them in pursuance of this Act, and shall keep them for such time (if any) as may be necessary for the purpose of settling any business arising at the place where such documents come into their hands, or for any other proper purpose, and shall, if required, produce them for any of such purposes, and shall then transmit them to the registrar-general of seamen, to be by him recorded and preserved; and the said registrar shall, on payment of a moderate fee to be fixed by the Board of Trade, or without payment of any fee if the Board of Trade so directs, allow any person to inspect the same; and in cases in which the production of the original of any such document in any court of justice or elsewhere is essential, shall produce the same, and in other cases shall make and deliver to any person requiring it a certified copy of any such document or of any part thereof; and every copy purporting to be so made and certified shall be received in evidence, and shall have all the effect of the original of which it purports to be a copy." See also § 138, cited post, § 1451.

[2] Under 6 & 7 Will. 4, c. 32. See, however, Walker *v.* Giles, 6 Com. B. 662, where the law, as stated in the text, was doubted.

[3] 15 & 16 Vict., c. 31, § 8; 18 & 19 Vict., c. 63, § 48.

[4] 18 & 19 Vict., c. 63, § 30, enacts, that "all rules and tables of any society established under" the Acts relating to friendly societies, "and all alterations and amendments thereof, and all copies thereof or extracts therefrom, and all writings and documents relating to a friendly society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received in all courts of law and equity, and elsewhere, without proof of the signature thereto."

are proveable by copies certified under the hand of an inspector;[1] the memorials setting forth the firm names, and the names and places of abode of the members and public officers of banking copartnerships,[2] which are kept at the Office of Inland Revenue,[3] and which may be proved by copies certified under the hand of one of the commissioners of Inland Revenue; the declarations delivered at the Office of Inland Revenue[4] by the printers, publishers, and proprietors of newspapers, pursuant to the Act of 6 & 7 Will. 4, c. 76, which documents are proveable by certified copies under the hand of one of the commissioners of Inland Revenue, or of any officer in whose possession the same shall be;[5]

[1] 18 & 19 Vict., c. 108, § 15, enacts, that "a copy of the special rules for the time being established in any coal mine or colliery, certified under the hands of one of the inspectors to be a copy of the special rules established in such coal mine or colliery, shall be evidence of such special rules, and of their being duly established under the Act, without further proof."

[2] 7 Geo. 4, c. 46, §§ 4, 6. [3] 12 & 13 Vict., c. 1, § 5. [4] Id. § 4.

[5] It may here be advisable to set out the words of the Act. § 6 enacts, that the declaration "shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition, and place of abode of every person who is intended to be the printer or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper, who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom who shall be a proprietor of the same, if the number of such last-mentioned persons (exclusive of the printer and publisher) shall not exceed two, and in case such number shall exceed two, then of such two persons, being such proprietors resident in the United Kingdom, the amount of whose respective proportional shares in the property, or in the profit or loss of such newspaper, shall not be less than the proportional share of any other proprietor thereof resident in the United Kingdom, exclusive of the printer and publisher, and also where the number of such proprietors resident in the United Kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration; and every such declaration shall be made and signed by every person named therein as printer or publisher of the newspaper to which such declaration shall relate, and by such of the said persons named therein as proprietors as shall be resident within the United Kingdom; and a declaration of the like import shall be made, signed, and delivered in like manner, whenever and

the orders, minutes of proceedings, and correspondence of the Board of Trade, in relation to railways, which may be proved by

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so often as any share, interest, or property soever in any newspaper named in any such declaration shall be *assigned*, transferred, divided, or changed by act of the parties, or by operation of law, so that the respective proportional shares or interests of the persons named in any such declaration as proprietors of such newspaper, or either of them, shall respectively become less than the proportional share or interest of any other proprietor thereof, exclusive of the printer and publisher, and also whenever and so often as any printer, publisher, or proprietor named in any such declaration, or the person conducting the actual printing of the newspaper named in any such declaration, shall be changed, or shall change his place of abode, and also whenever and so often as the title of any such newspaper, or the printing office, or the place of publication thereof shall be changed, and also whenever in any case, or on any occasion, or for any purpose, the said commissioners, or any officer of stamp duties authorised in that behalf, shall require such declaration to be made, signed, and delivered, and shall cause notice in writing for that purpose to be served upon any person, or to be left or posted at any place, mentioned in the last preceding declaration delivered as aforesaid as being a printer, publisher, or proprietor of such newspaper, or as being the place of printing or publishing any such newspaper respectively; and every such declaration shall be made before any one or more of the said commissioners, or before any officer of stamp duties or other person appointed by the said commissioners, either generally or specially in that behalf." * *

§ 8 enacts, that "all such declarations as aforesaid shall be filed and kept in such manner as the commissioners of stamps and taxes shall direct for the safe custody thereof; and *copies* thereof *certified to be true copies* as by this Act is directed, shall respectively *be admitted in all proceedings, civil and criminal*, and upon every occasion whatsoever, touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, *as conclusive evidence of the truth of all such matters set forth in such declaration* as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question, *against every person who shall have signed such declaration*, *unless* it shall be proved that previous to such time such person became lunatic, or that previous to the publication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners or to such officer as aforesaid, or unless it shall be proved that, previous to such occasion as aforesaid, a new declaration of the same or similar nature respectively, or such as may be required by law, was duly signed and made and delivered as aforesaid respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorised officer by whom any such declaration shall be kept according to the directions of this Act, shall, *upon application*

certified copies, signed by the officer appointed for that purpose by the Board;[1] the minutes of the orders given by any board of

in writing made to them or him respectively by any person requiring a copy certified according to this Act of any such declaration as aforesaid, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy, or cause the same to be delivered, to the person applying for the same upon payment of the sum of one shilling, and no more; and *in all proceedings and upon all occasions whatsoever a copy of any such declaration, certified to be a true copy under the hand of one of the said commissioners or of any officer in whose possession the same shall be,*[a] * * *shall be received in evidence against any and every person named in such declaration as a person making or signing the same, as sufficient proof of such declaration, and that the same was duly signed and made according to this Act, and of the contents thereof*; and every such copy, so produced and certified, shall have the same effect for the purposes of evidence against any and every such person named therein as aforesaid, to all intents whatsoever, as if the original declaration, of which the copy so produced and certified shall purport to be a copy, had been produced in evidence, and been proved to have been duly signed and made by the person appearing by such copy to have signed and made the same as aforesaid; and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid against any person having signed and made such declaration, *and a newspaper shall afterwards be produced in evidence intituled in the same manner as the newspaper mentioned in such declaration is intituled, and wherein the name of the printer and publisher and the place of printing shall be the same as the name of the printer and publisher and the place of printing mentioned in such declaration, or shall purport to be the same,* whether such title, name, and place printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the *plaintiff, informant, or prosecutor*[b] in any action, prosecution, or other proceeding, to prove that the newspaper to which such action, prosecution, or other proceeding may relate was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold."

[1] 7 & 8 Vict., c. 85, § 23. The powers of the Board were transferred to the Commiss. of Rail. by 9 & 10 Vict., c. 105, and it seems that certified copies of their proceedings, if admissible at all, must be signed by two of the Commissioners, and sealed or stamped with their official seal; § 4, cited

[a] The signature and official character of the officer need not be proved, 8 & 9 Vict., c. 113, § 1; cited ante, § 7.

[b] Qu. as to the case where a defendant, in mitigation of damages, puts in a libel previously published against him by the plaintiff? See Watts *v.* Fraser, 7 A. & E. 223.

guardians or district board, respecting any complaint, claim, or application made to them, which may be proved by a copy purporting to be signed by the chairman of the Board, and to be sealed with their seal, and to be countersigned by their clerk;[1] orders made by the Lord Chancellor in matters in lunacy, and reports of the masters in lunacy confirmed by fiat, which may be proved by office copies purporting to be signed by the registrar in lunacy, and to be sealed or stamped with the seal of his office;[2] licences, orders, and instruments, granted, made, issued, or authorised by the Commissioners in Lunacy, in pursuance of the Act of 8 & 9 Vict., c. 100, copies of which, purporting to be sealed or stamped with the seal of the commission, are receivable in evidence;[3] orders and resolutions of the local authority under

ante, p. 1278, n. 1. Since the 10th of Oct., 1851, these Commiss. have been abolished, and their powers re-transferred to the Board of Trade. See 14 & 15 Vict., c. 64.

[1] 7 & 8 Vict., c. 101, § 69, enacts, that "every copy of a minute of any order, complaint, claim, application, or authority of any such Board of guardians or district Board, purporting respectively to be signed by the presiding chairman of such guardians or district Board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the directions respecting such order, complaint, claim, or application having been given as alleged in the copy of such minute, and shall be received in evidence accordingly by and before all courts of justice and all justices, without any proof of the signatures, or of the official characters of the persons signing the same, or of such seal, or of such meeting." This § is not very intelligibly worded, but its substance appears to be as stated in the text.

[2] 16 & 17 Vict., c. 70, § 100, enacts, that "every order made in a matter in lunacy by the Lord Chancellor intrusted as aforesaid, when drawn up by the registrar in lunacy, and signed by the Lord Chancellor intrusted as aforesaid, shall be entered by the registrar in lunacy in a proper book, to be provided by him for that purpose; and he shall furnish office copies of any order or of any report, confirmed by fiat, or of any part thereof respectively, signed by him, and sealed or stamped with the seal of his office, to every party in the matter or other person entitled thereto who shall require the same; and every office copy of the whole of any order or report confirmed as aforesaid, purporting to be so signed and sealed, or stamped with such seal, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted as evidence of the order or report confirmed as aforesaid, of which it purports to be a copy, without any further proof thereof."

[3] 8 & 9 Vict., c. 100, § 7, enacts, that "all such licences, orders, and

the Nuisances Removal Act for 1855, or of their committee, which may be proved by copies purporting to be signed by the chairman of such body or committee;[1] documents purporting to proceed from the General Board of Health, which are proveable by copies purporting to be signed by the president or any two or more of the members of such board, and to be sealed or stamped with the office seal;[2] documents purporting to proceed from any local Board of Health, which are proveable by copies purporting to be signed by any five or more of the members, and to be sealed or stamped with the seal of the Board, or, in the case of a corporate district, to be sealed with the common seal;[3] the awards and orders made or confirmed by the Inclosure Commissioners for England and Wales, and other instruments proceeding from their Board, which may be proved by copies purporting to be sealed with the seal of the Board;[4] the copies of the confirmed awards of the same commissioners, which are deposited with the clerk of the peace of the county where the lands inclosed are situate, and which are proveable by copies or extracts "signed by the clerk of the peace or his deputy, purporting the same to be a

instruments, or copies thereof, purporting to be sealed or stamped with the seal of the commission, shall be received as evidence of the same respectively, and of the same respectively having been granted, made, issued, or authorised by the commissioners, without any further proof thereof; and no such licence, order, or instrument, or copy thereof, shall be valid, or have any force or effect, unless the same shall be so sealed or stamped as aforesaid." These last words seem to *exclude* all *examined* copies. Some few orders and instruments are exempted from the operation of this section, the Act expressly requiring them to be given or signed and sealed by one commissioner or by two commissioners. See 16 & 17 Vict., c. 96.

[1] 18 & 19 Vict., c. 121, § 32, enacts, that "copies of any orders or resolutions of the local authority or their committee, purporting to be signed by the chairman of such body or committee, shall, unless the contrary be shown, be received as evidence thereof, without proof of their meeting, or of the official character or signature of the person signing the same."

[2] 17 & 18 Vict., c. 95, § 6, enacts, that "all documents or copies of documents purporting to proceed from such Board, and to be signed by the president, or any two or more of the members of such Board, and to be sealed or stamped with the seal of the General Board of Health, shall be received as primâ facie evidence in all courts or places whatsoever." See also 18 & 19 Vict., c. 116, § 13.

[3] 11 & 12 Vict., c. 63, § 35, cited ante, p. 11, n. 3; 18 & 19 Vict., c. 116, § 15.

[4] 8 & 9 Vict., c. 118, § 2.

true copy;"[1] the plans and books of reference deposited by railway companies with the clerks of the peace, which may be proved by copies or extracts certified by them;[2] the minutes of the proceedings of the Board of Charity Commissioners, and all orders, certificates, and schemes made or approved by them, which are proveable by copies purporting to be extracted from the books of the Board, and to be certified by their secretary;[3] all deeds of exchange made by ecclesiastical corporations under the provisions of the Act for facilitating the exchange of lands lying in common fields, and all leases and other instruments made under the Act for enabling incumbents of ecclesiastical benefices to demise their lands on farming leases, which are respectively entered in the proper ecclesiastical registry, and which may be proved by office copies certified under the hand of the registrar or his deputy;[4] all counterparts of leases and other instruments deposited with the Ecclesiastical Commissioners for England, under the provisions of the Act enabling ecclesiastical corporations to grant leases for long terms, and which are proveable by office copies certified under the seal of the Commissioners;[5] all agreements and awards confirmed by the Tithe Commissioners, and other instruments

[1] 8 & 9 Vict., c. 118, § 146. See also, 41 Geo. 3, c. 109, § 35; and 3 & 4 Will. 4, c. 87, §§ 2, 4.

[2] 8 & 9 Vict., c. 20, § 10. See post, § 1457.

[3] 16 & 17 Vict., c. 137, § 8, enacts, that "the said Board shall cause minutes of their proceedings, and all orders, certificates and schemes, made or approved by them under this Act, to be entered in books to be provided and kept for such purpose, and all such entries shall be signed by their secretary, and all copies purporting to be extracted from the books of the said Board, and to be certified by their secretary, of any such minutes, orders, certificates, and schemes entered as aforesaid, shall be received as evidence of the proceedings to which such minutes shall relate, and of such orders, certificates, or schemes, and of the making or approval thereof (as the case may require) by the said Board, without further proof thereof." See also 18 & 19 Vict., c. 124, §§ 4 & 5, cited ante, p. 12, n. 2.

[4] 4 & 5 Will. 4, c. 30, §§ 10, 11; 5 & 6 Vict., c. 27, § 14.

[5] 5 & 6 Vict., c. 108, § 29, enacts, that such office copies "shall, in any action against the lessee, and in all other cases, be admitted and allowed in all courts whatsoever as legal evidence of the contents of such instrument or document, and of the due execution thereof by the parties, who on the face of such office copy shall appear to have executed the same, and in the case of any lease, grant, or confirmation, of the due execution by the lessee of the counterpart thereof."

proceeding from their Board, which are proveable by copies purporting to be sealed or stamped with the seal of the Board;[1] all decrees, orders, and records of proceedings of the now abolished[2] Metropolitan Commissioners of Sewers, which are proveable by copies purporting to be sealed or stamped with the seal of the Commissioners;[3] all orders, regulations, awards, or other instruments, made or executed by, or by the authority of the Commissioners for consolidating and adjusting the turnpike trusts of South Wales, which may be proved by copies purporting to be sealed by their official seal;[4] the order of a general meeting of any company subject to the provisions of the Companies Clauses Consolidation Act, authorising the borrowing of any money, which is proveable by a copy certified to be true by one of the directors or by the secretary;[5] all entries made in the registers kept under the Common Lodging-house Acts of 1851 and 1853,[6] which are proveable by copies certified to be true by the person having charge of the register;[7] the books kept at the office of the Commissioners of the Police of the Metropolis, wherein are entered the particulars of the licences granted to the drivers, conductors, and watermen of metropolitan public carriages, and entries in which may be proved by copies purporting to be certified by the person having the charge of the books;[8] and the duplicates or

[1] 6 & 7 Will. 4, c. 71, § 2. [2] By 18 & 19 Vict., c. 120.

[3] 11 & 12 Vict., c. 112, § 25, cited ante, p. 11, n. 5.

[4] 7 & 8 Vict., c. 91, § 2. [5] 8 & 9 Vict., c. 16, § 40.

[6] 14 & 15 Vict., c. 28; and 16 & 17 Vict., c. 41.

[7] 16 & 17 Vict., c. 41, § 5, enacts, that "a copy of an entry made in a register kept under the recited Act [14 & 15 Vict., c. 28], certified by the person having the charge of the register to be a true copy, shall be received in all courts and before all justices and on all occasions whatsoever as evidence, and be sufficient proof of all things therein registered, without production of the register or of any document, act, or thing on which the entry is founded; and every person applying at a reasonable time shall be furnished gratis by the person having such charge with a certified copy of such entry."

[8] 6 & 7 Vict., c. 86, § 16, enacts, that "the particulars of every licence which shall be granted as aforesaid, shall be entered in books to be kept for that purpose at the office of the [Commissioners of the Police of the Metropolis; see 13 & 14 Vict., c. 7, §§ 1 & 2]; and in all courts and before any justice of the peace, and upon all occasions whatsoever, a copy of any entry made in any such book, and certified by the person having the charge thereof

copies of stage-carriage licences, filed in the Office of Inland Revenue whence the licences issue, and which are proveable by copies purporting to be certified under the hand of one of the Commissioners of Inland Revenue, or of the officer by whom the licence has been granted, or of some other person appointed and authorised by the Commissioners in that behalf.[1]

to be a true copy, shall be received as evidence, and be deemed sufficient proof of all things therein registered, without requiring the production of the said book, or of any licence, or of any requisition or other document upon which any such entry may be founded; and every person applying at all reasonable times shall be furnished with a certified copy of the particulars respecting any licensed person without payment of any fee." It is difficult to discover whether the above provision has been affected in any way by the recent Acts, 16 & 17 Vict., cc. 33 & 127. The Act of 16 & 17 Vict., c. 112, contains in § 12 a somewhat similar enactment as to licences granted to drivers and conductors of public carriages in Dublin.

[1] 12 & 13 Vict., c. 1, § 16. See 10 & 11 Vict., c. 42; and see also 5 & 6 Vict., c. 79, § 10, which,—after reciting, that, by 2 & 3 Will. 4, c. 120, § 11, "a copy of every licence to keep, use, or employ a stage carriage, and of every indorsement made thereon, shall be kept at the office or place from which such licence shall be issued, in order that every person may have a copy thereof, paying one shilling for the same; and that it is expedient that such copies, certified as hereinafter mentioned, should be received as evidence of the granting, and of the contents of such licences respectively, and of the indorsements thereon,"—enacts, "That the Commissioners of Stamps and Taxes, or the officer by whom any such licence shall have been granted, or other officer of stamp duties authorised by the said Commissioners in that behalf, shall, upon application made to them or him for that purpose, deliver to the person requiring the same a copy of any such licence, certified according to this Act, on payment of the sum of one shilling; and in all proceedings and upon all occasions whatsoever a copy of any such licence, and of every indorsement thereon (if any), the same being made and taken from the copy thereof filed or kept at such office or place as aforesaid, and certified to be a true copy under the hand of one of the said Commissioners, or of the officer by whom such licence shall have been granted, or other officer authorised as aforesaid, * * * shall be received as evidence, against any and every person appearing by such copy to be named in such licence, that the same was duly granted by such person, and of the contents thereof, and of every indorsement thereon; and in any such case the said Commissioners, or any of their officers, shall not be required or compellable to produce in any court, or at any place out of the office of the said Commissioners or officers respectively, the original of any such licence or indorsement, or any copy thereof, filed or kept in any such office, or any entry or memorandum relating to such licence in the books of the said Commissioners or officers, or to give any other evidence or proof of the

§ 1441. The proof of *certificates* is now much simplified by the Documentary Evidence Act; for if they *purport* to be verified in the manner pointed out by the statute which renders them admissible, they will be received in evidence without proof of the seal, the signature, or the official character of the party verifying them.[1] Still, as the language of the Legislature varies much in fixing the mode by which particular certificates are authenticated, it will be convenient briefly to notice those statutes which relate to certificates of the most general importance.[2]

§ 1442. First, all boards of guardians, or district boards, are authorised to make *certificates* of the *chargeability* of any paupers, and if these documents substantially follow the form given by the Act of 7 & 8 Vict., c. 101, and purport to be signed by the chairman of the respective boards, to be sealed with their seals, and to be countersigned by their clerk, they are primâ facie evidence of the truth of all statements contained therein, and no other proof of chargeability is required for the purpose of making any order of removal or other order, provided such order bear date within twenty-one days next after the day of the date of any such certificate.[3] Again *certificates* of the *settlements* of paupers are

granting or contents of any such licence or indorsement than any such copy certified as aforesaid." The above section requires proof of the handwriting of the party certifying; but this is no longer necessary. See 8 & 9 Vict., c. 113, § 1, cited ante, § 7.

[1] 8 & 9 Vict., c. 113, § 1. Ante, § 7.

[2] As to certificates of bankruptcy, see ante, § 1394. As to certificates of the acknowledgment of deeds by married women, see ante, § 1387.

[3] 7 & 8 Vict., c. 101, § 69, enacts, that "it shall be lawful for any board of guardians or district board, at any meeting thereof, to make a certificate in the form, or to the effect, contained in the schedule of this Act marked C, and that every such certificate, * purporting to be signed by the presiding chairman of such guardians or district board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the truth of all the statements contained in such certificate, * and shall be received in evidence accordingly by and before all courts of justice and all justices, without any proof of the signatures or of the official characters of the persons signing the same, or of such seal, or of *such meeting*; and that, for the purpose of making any order of removal or other order, no further or other evidence of chargeability than such certificate shall be required,

receivable in evidence, if they purport to be allowed and subscribed by two justices of the county, &c., wherein the parish lies, and if the justices further certify, that the due execution of the certificates by the parish officers has been sworn to before them by one or both of the attesting witnesses.[1]

§ 1443. With the view of reducing the expense attendant upon the proof of criminal proceedings, the Legislature has enacted, in § 13 of Lord Brougham's Evidence Act of 1851,[2] that "whenever,

provided that every such order bear date within twenty-one days next after the day of the date of such certificate."

SCHEDULE C.

"The board of guardians of the poor of the union [*or* parish of] do hereby certify, that on the day of A. B., and his wife, C. B., and his child, E. B., became chargeable to the parish of , in the said union [*or* to the said union].

In testimony whereof the common seal of the said guardians is hereunto affixed at the meeting of their board this day of , 18 .

(L. S.) (Signed) W. J., presiding chairman of the said board.

(Countersigned) C. D., clerk [*or* acting as clerk] to the board of guardians of ."

In order to clear up any doubt respecting the admissibility of these certificates, it has been further enacted by 11 & 12 Vict., c. 110, § 11, that "in any court, and before any justice or justices, and for all purposes, a certificate of the chargeability of any person named therein in the form prescribed in the schedule marked C to the Act of the eighth year of the reign of her present Majesty for the amendment of the Laws for Relief of the Poor in England, and purporting to have been executed in the manner prescribed by that Act, shall be received within the space of twenty-one days from the date thereof as sufficient evidence of the chargeability of the person named therein, unless the contrary be otherwise shown."

[1] 8 & 9 Will. 3, c. 30, § 1, enacts, that the certificate shall be under the hands and seals of the majority of the churchwardens and overseers of the parish, and attested by two credible witnesses, and allowed and subscribed by two justices of the place whence such certificate shall come. Then 3 Geo. 2, c. 29, § 8, provides, that the attesting witnesses, or one of them, shall make oath before the allowing justices that they saw the parish officers sign and seal the certificate, and the justices shall certify that such oath was made before them; "and every such certificate so allowed, and oath of the execution thereof, *so certified by the said justices*," shall be allowed in all courts as proved, and shall be "received as evidence, *without other proof* thereof."

[2] 14 & 15 Vict., c. 99.

in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient[1] that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."[2]

§ 1444. Independent of this general provision, several other statutes have been passed from time to time, for the purpose of facilitating the proof of particular criminal trials. Thus, the statute of 7 & 8 Geo. 4, c. 28, § 11, enacts, that if a party be indicted for felony committed after a *previous conviction* for felony, "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall *upon proof of the identity of the person of the offender*, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same." So, the Act of 2 Will. 4, c. 34, which consolidates the law relating to offences against the coin, provides in § 9, that, "where any person [who] shall have been convicted of any offence against this Act, shall afterwards be indicted for any offence against this Act, committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or

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[1] See ante, § 1409, ad fin.

[2] See also 17 & 18 Vict., c. 125, § 25, and 19 & 20 Vict., c. 102, § 28, Ir., cited ante, § 1294, which regulate the proof of certificates of conviction, when produced for the purpose of discrediting witnesses.

officer, shall, upon *proof of the identity* of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same." The Act, too, of 14 & 15 Vict., c. 100, enacts in § 22, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer, (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken,) shall, upon the trial of any indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same."

§ 1445. The Act of 1851 for the better prevention of offences[1] contains a very similar provision in § 2, which enacts, that if any person be indicted for any misdemeanor under the first section of that Act after a conviction for felony or for any *such* misdemeanor, "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same." So, the Act of 4 Geo. 4, c. 64, provides by § 44, that "in case of any prosecution for an escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person

[1] 14 & 15 Vict., c. 19.

or persons concerned therein, or aiding, abetting, or assisting the same, a *certificate given by the clerk of assize*, or other clerk of the court in which such offender shall have been convicted, shall, together *with due proof of the identity of the person*, be sufficient evidence to the Court and jury, of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced." So, if an indictment be preferred, either against an offender under sentence of transportation for being unlawfully at large, or against any one for rescuing or attempting to rescue any such offender,[1] a certificate in writing, containing the effect and substance only of the indictment and conviction of such offender and of the sentence for his transportation, shall be received as sufficient evidence of the conviction and sentence, provided such certificate purport to be signed by the clerk of the court, or other officer having the custody of the records of the court where such sentence shall have been passed, or, if such court be out of Great Britian, then provided such certificate be certified by what purports to be the seal of the court, or the signature of the judge or of one of the judges thereof.[2] It has been held that the signature of one of three deputy clerks of

[1] Under 5 Geo. 4, c. 84, §§ 22, 23; modified as to punishment by 4 & 5 Will. 4, c. 67.

[2] This appears to be the legal effect of § 24 of 5 Geo. 4, c. 84, as read in connexion with § 1 of the Docum. Evid. Act. See ante, § 7. In order, however, to prevent mistakes, § 24 is here given at length. "The clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court or by the signature of the judge or one of the judges of the court, without further proof."

the peace, who were in partnership as attorneys, and at whose office the records of the sessions were kept, was a sufficient compliance with the above provisions.[1] It seems, too, that an ordinary certificate of previous conviction for felony will satisfy the statute, and be regarded as good evidence of the sentence, as well as of the indictment and conviction.[2]

§ 1446. Under the *Mutiny* and *Marine Mutiny Acts*, no person who has been tried before a court of law for any crime there cognizable, shall be liable to be punished for the same by any court-martial, otherwise than by cashiering; and a certificate, containing the substance and effect, but omitting the formal part of the indictment, conviction, or acquittal of such person, may be transmitted by the clerk or other officer having the custody of the records of the court, or his deputy, to the officer commanding the regiment or division to which the accused belongs; but both Acts are silent as to the mode of authenticating or proving the certificate, and as to its effect when proved.[3] Under the same Acts, orders of penal servitude or of transportation, made with respect to offenders sentenced by courts-martial, must be filed of record in the Crown Office of the Queen's Bench; and the clerk of such office is directed, on application, to deliver to the offender or his agent, or to any person applying on her Majesty's behalf, a certificate in writing, "showing the Christian and surname of such offender, his offence, the place where the Court was held before whom he was convicted, the sentence,[4] and the conditions on which the order of penal servitude or of transportation was given; which certificate shall be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such order for his penal servitude or transportation was given, in any court and in any proceeding."[5] Certificates of previous convictions by courts-martial are also admissible under these Acts, for

[1] R. v. Jones, 2 C. & Kir. 524, per Coltman, J.

[2] R. v. Ambury, 6 Cox, Cr. Cas. 79, per Williams, J.

[3] See 17 & 18 Vict., c. 4, § 51; 17 & 18 Vict., c. 6, § 5. Nothing can be more slovenly than the manner in which those annual Acts are drawn.

[4] "The sentence" is omitted in the Mutiny Act.

[5] See 17 & 18 Vict., c. 4, § 23; 17 & 18 Vict., c. 6, § 25.

the purpose of affixing punishment, in case any soldier or marine be found guilty by court-martial of any subsequent offence; and, for the same purpose, certificates of previous convictions by the common-law courts, for offences of a felonious, fraudulent, or unnatural nature, may be received; and either class of certificates will be admissible, without proving the signature or official character of the person signing them, provided they purport to be drawn and signed in the mode specified by the respective Acts.[1] Again, in the common-law courts, if a soldier or marine be tried for obtaining money under false pretences as a deserter, after having been convicted of a like offence, or of a fraudulent confession of desertion, a certificate describing in general terms the former indictment and conviction, and purporting to be signed by the clerk of the court, or other officer having the custody of the records, or his deputy, or by the clerk of the convicting magistrates, shall, upon proof of identity, be sufficient evidence of the former conviction.[2]

§ 1446 A. Justices in petty sessions are now empowered by statute 18 & 19 Vict., c. 126, to determine charges of petty larceny in a summary way, whenever the persons accused consent to such a mode of trial; and § 7 of the Act,—after directing that in every such case the conviction, or a duplicate of a certificate of dismissal, shall, together with the other proceedings, be transmitted to the Quarter Sessions, and be there recorded,—goes on to provide, that "a copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceeding whatever."

§ 1447. Under the Act of 9 Geo. 4, c. 31, § 27, two justices are empowered to hear cases of *common assault or battery;* and if upon the hearing, they "shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly

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[1] See 17 & 18 Vict., c. 4, § 16; 17 & 18 Vict., c. 6, § 18.

17 & 18 Vict. 4, § 49; 17 & 18 Vict., c. 6, § 53.

dismiss the complaint, they shall forthwith make out a *certificate under their hands* stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. § 28 then provides, that the person obtaining such certificate shall be released from all proceedings, civil or criminal, for the same cause.[1] It seems, that a certificate under this Act should specify the ground of dismissal,[2] and should be given within a reasonable time after the hearing,[3] if not before the justices separate;[4] and it has also been held that, in order to take advantage of the certificate, the defendant must plead it specially.[5]

§ 1448. The Act for the trial of *juvenile offenders*[6] enables two justices at petty sessions to try summarily any person charged with having committed or attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any simple larceny, or offence punishable as simple larceny, provided the age of such person at the date of the offence shall not, in the opinion of such justices, exceed sixteen years;[7] and it then provides, in § 1, that "if such justices upon the hearing of any such case shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for his future good behaviour, or without such sureties, and then make out and deliver to the party charged a *certificate* under the hands of such justices stating the fact of such *dismissal;* and such certificate

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[1] See Tunnicliffe v. Todd, 5 Com. B. 553. There, the complainant, after summons, declined to proceed, saying he meant to bring an action, and the justices dismissed the complaint, stating in the certificate that they did so as the complainant offered no evidence. The Court held that the certificate was a bar to the action.

[2] Skuse v. Davis, 10 A. & E. 635; 2 P. & D. 550; 7 Dowl. 774, S. C.

[3] See Christie v. Richardson, 10 M. & W. 688.

[4] Compare R. v. Robinson, 12 A. & E. 672; 4 P. & D. 391, S. C.; with Thompson v. Gibson, 8 M. & W. 285, 286.

[5] Harding v. King, 6 C. & P. 427, per Gurney, B. See also Skuse v. Davis, 10 A. & E. 635.

[6] 10 & 11 Vict., c. 82. For the Irish law on this subject, see 14 & 15 Vict., c. 92, § 6.

[7] Extended from fourteen to sixteen years by 13 & 14 Vict., c. 37.

shall and may be in the form or to the effect set forth in the Schedule."[1] § 3 then enacts, that every person who shall have obtained such certificate of dismissal, or shall have been convicted[2] under the authority of the Act, shall be released from all further or other proceedings for the same cause.

§ 1449. *Certificates of indemnity* are sometimes granted to *witnesses*, who make full disclosures respecting corrupt practices at elections for members of Parliament, gaming, and other illegal transactions; and then, in the event of any ulterior proceedings being instituted against such witnesses, the certificates will constitute a valid defence, and will be received in evidence on their mere production, provided that they be drawn up in the proper form, and that they purport to be signed by the persons who are respectively authorised to grant them.[3]

§ 1450. The Act of 1849 for facilitating the marriage of British subjects resident in foreign countries,[4] contains a very remarkable clause; for, after authorising British consuls to solemnise and register certain marriages, and after providing that parties guilty of fraud, or of taking false oaths, should respectively be liable to forfeit all property accruing from the marriage, and to be prosecuted for perjury, it goes on in § 17 to enact, that in every action or suit for forfeiture, and upon every prosecution for perjury, as aforesaid, "the *declaration* and *certificate* of the consul, under his hand and consular seal, shall be received and taken as good and valid evidence in the law of all facts and

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[1] *Form of Certificate of Dismissal* :—
—— to wit. We —— of Her Majesty's justices of the peace for the county of ——, [*or*, I, a magistrate of the police court of ——, *as the case may be*], do hereby certify, that on the —— day of ——, in the year of our Lord ——, at ——, in the said county of ——, M. N. was brought before us, the said justices, [*or*, me, the said magistrate,] charged with the following offence, (that is to say,) [*here state briefly the particulars of the charge,*] and that we, the said justices, [*or* I, the said magistrate,] thereupon dismissed the said charge. Given under our hands, [*or* my hand,] this —— day of ——.

[2] Under § 11, the conviction must be returned to the clerk of the peace, to be kept among the records of the Quarter Sessions.

[3] See Acts noticed ante, § 1310; and 8 & Vict., c. 113, § 1, cited ante, § 7.

[4] 12 & 13 Vict., c. 68.

matters stated in such declaration and certificate, without its being necessary for the said consul to attend in person to prove the same."

§ 1450A. Under the recent Act for registering places of worship of dissenters, the Registrar-General is directed, "with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncancelled," to "give to any person demanding the same, a certificate, sealed or stamped with the seal of the General Register Office, that at the time or respective times in such certificate in that behalf stated the place therein described was duly certified and duly recorded as required by this Act, and that at the date of such sealed or stamped certificate, the record of such certification remained uncancelled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned, without any further or other proof of the same."[1] The Act, too, of 19 & 20 Vict., c. 119, contains, in § 24, somewhat similar provisions;[2] and a recital in that section furnishes the curious statistical information, that the number of meeting-houses of dissenters recorded in 1852 was little short of fifty-five thousand.

[1] 18 & 19 Vict., c. 81, § 11.

[2] The words are as follows:—"The Registrar-General, on payment to him of the several fees hereinafter mentioned, shall allow searches to be made in the returns so made to him as aforesaid, and shall give to any person demanding the same a certified copy thereof, or extract therefrom, with respect to any place of meeting for religious worship contained therein; and every such certified copy or extract shall be sealed or stamped with the seal of the General Register Office, and when so sealed or stamped as aforesaid, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the place of meeting therein mentioned or described having been at the time in that behalf therein stated duly certified and registered or recorded as by law required, without any further or other proof of the same; and the registrar-general shall be entitled to demand and receive for every search in the said returns extending over a period of not more than ten years the sum of one shilling, and for every additional period of ten years the sum of sixpence, and the further sum of two shillings and sixpence for every single certified copy or extract."

§ 1451. Under the Merchant Shipping Act of 1854, "all documents purporting to be certificates issued by the Board of Trade in pursuance of this Act, and to be sealed with the seal of such Board, or to be signed by one of the officers of the Marine department of such Board, shall be received in evidence, and shall be deemed to be such certificates, without further proof, unless the contrary be shown."[1] By virtue, too, of the same statute, every certificate of registry of any British ship purporting to be signed by the registrar or other proper officer, is receivable in evidence as primâ facie proof of all the matters either contained in or indorsed on it, provided they purport to be authenticated by the signature of a registrar.[2] So, all certificates, whether of competency or service, granted to the masters or mates of British ships, are proveable not only by the production of the originals as issued by the Board of Trade, but also primâ facie by copies, purporting to be certified by the Registrar-General of seamen, or his assistant, or by such other person as the Board of Trade appoints for that purpose.[3]

§ 1452. The statutes 5 & 6 Vict., c. 100, and 6 & 7 Vict., c. 65, which relate to the *copyright of designs* for articles of manufacture, and provide for the appointment of certain officers, whose

[1] 17 & 18 Vict., c. 104, § 7.

[2] § 107, cited ante, p. 1287, n. 3. As to certificates of desertion from any ship, see § 249 of the Act.

[3] § 138 enacts, that "all certificates, whether of competency or service, shall be made in duplicate, and one part shall be delivered to the person entitled to the certificate, and the other shall be kept and recorded by the Registrar-General of Seamen, or by such other person as the Board of Trade appoints for that purpose; and the Board of Trade shall give to such registrar or such other person immediate notice of all orders made by it for cancelling, suspending, altering, or otherwise affecting any certificate in pursuance of the powers herein contained; and the registrar or such other person as aforesaid shall thereupon make a corresponding entry in the record of certificates; and a copy purporting to be certified by such registrar or his assistant or by such person as aforesaid of any certificate, shall be primâ facie evidence of such certificate, and a copy purporting to be so certified as aforesaid of any entry made as aforesaid in respect of any certificate, shall be primâ facie evidence of the truth of the matters stated in such entry."

duty it shall be to register drawings or prints of the designs therein mentioned, and the transfer of such designs, and to furnish the proprietors thereof with *certificates* of such *registration*, enacts, that these certificates, "purporting to be signed by the registrar or deputy-registrar, and purporting to have the seal of office of such registrar affixed thereto," shall be received as primâ facie evidence, without proving the official character of the party signing, his signature, or his seal.[1] Similar provisions are contained in the Act for the regulation of charitable loan societies in Ireland.[2]

§ 1453. The Act of 11 & 12 Vict., c. 98, which directs the Speaker of the House of Commons to grant a certificate, signed

[1] 5 & 6 Vict., c. 100, § 16, enacts, that "upon every copy, drawing, or print of an original design so returned to the person registering as aforesaid, or attached thereto, and upon every copy, drawing, or print thereof received for the purpose of such registration, or of the transfer of such design being certified thereon or attached thereto, the registrar shall certify under his hand that the design has been so registered, the date of such registration, and the name of the registered proprietor, or the style or title of the firm under which such proprietor may be trading, with his place of abode or place of carrying on his business, or other place of address, and also the number of such design, together with such number or letter, or number and letter, and in such form as shall be employed by him to denote or correspond with the date of such registration; and *such certificate* made on every such original design, or on such copy thereof, and *purporting to be signed* by the *registrar* or *deputy-registrar*, and *purporting* to have the *seal of office* of *such registrar affixed thereto*, shall, in the absence of evidence to the contrary, be sufficient proof as follows:—

Of the design, and of the name of the proprietor therein mentioned, having been duly registered; and

Of the commencement of the period of registry; and

Of the person named therein as proprietor being the proprietor; and

Of the originality of the design; and

Of the provisions of this Act, and of any rule under which the certificate appears to be made, having been complied with: and any such writing purporting to be such certificate shall, in the absence of evidence to the contrary, be received as evidence, without proof of the handwriting of the signature thereto, or of the seal of office affixed thereto, or of the person signing the same being the registrar or deputy-registrar." § 6 of 6 & 7 Vict., c. 65, and § 15 of 13 & 14 Vict., c. 104, respectively enact that the above provisions shall apply to those Acts.

[2] 6 & 7 Vict., c. 91, §§ 2, 11, 13, 15, 48, & 49; 7 & 8 Vict., c. 38, § 2; and 11 & 12 Vict., c. 115, § 6.

by himself, expressing the amount of costs allowed in election petitions, with the names of the parties respectively liable to pay, and entitled to receive the same, and which empowers the party obtaining such certificate to recover these costs by an action of debt, provides, that "the *certificate so signed by the Speaker* shall be *conclusive* evidence" of the amount of such costs, and of the title of such party, and that its validity shall not be called in question in any court, the *handwriting* of the Speaker thereunto being *duly verified*.[1] Similar language is employed in the same Act, with respect to certificates granted by the Speaker as to the validity of election petition recognizances, and as to defaults being made therein.[2] Again, under the House of Lords' and House of Commons' Costs Taxation Acts, the clerk of the Parliaments, or clerk assistant, and the Speaker, are respectively authorised to issue certificates of the amount of costs allowed on taxation in respect of private bills; and such certificates are *conclusive* evidence of the amount of such costs in all proceedings at law or in equity, and operate on production as warrants of attorney to confess judgment, unless the defendant has by plea denied his liability to make any payment in respect of them.[3] The Act, too, of 3 & 4 Vict., c. 9, provides,[4] that all proceedings, civil or criminal, against any person for the *publication of papers printed by order of Parliament*, shall be stayed, upon the production of a certificate under the hand of the Lord Chancellor, the Lord Keeper, or the Speaker of the House of Lords for the time being, the Clerk of the Parliaments, the Speaker of the House of Commons, or the Clerk of the same House, stating that such papers were published by order of either House.[5]

§ 1454. Under the Patent Law Amendment Act, 1852, the judge before whom any action for infringing letters patent shall be tried, may "*certify* on the record that the *validity* of the *letters patent*

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[1] §§ 94 & 96.
[2] § 98.
[3] 12 & 13 Vict., c. 78, § 9; 10 & 11 Vict., c. 69, § 9. The signatures to the certificates under these Acts need not be proved. See 8 & 9 Vict., c. 113, § 1, cited ante, § 7.
[4] § 1.
[5] The Act adds the words, "together with an affidavit verifying such certificate." This is not now necessary. See 8 & 9 Vict., c. 113, § 1, cited ante, § 7.

in the declaration mentioned came in question; and the record, with such certificate, being given in evidence in any suit or action for infringing the said letters patent, or in any proceeding by scire facias to repeal the letters patent, shall entitle the plaintiff in any such suit or action, or the defendant in such proceeding by scire facias, on obtaining a decree, decretal order, or final judgment, to his full costs, charges and expenses, taxed as between attorney and client, unless the judge making such decree or order, or the judge trying such action or proceeding, shall certify that the plaintiff or defendant, respectively, ought not to have such full costs."[1]

§ 1455. Every *certificate of incorporation*, under the Joint-stock Companies Acts, 1856, 1857, must set forth under the hand of the registrar, or in his absence, under the hand of the assistant registrar,[2] and in either event, as it would seem, under the seal of the registrar's office,[3] that the Company is incorporated, and, in the case of a limited Company, that the Company is limited;[4] and it will then, without proof of the seal, or of the signature or of the official character of the person signing it,[5] be "*conclusive* evidence that all the requisitions of the Act in respect of registration have been complied with; and the date of such certificate shall be deemed to be the date of the incorporation of the Company."[6] Where the certificate has been signed by the assistant registrar, the Court, on its being tendered in evidence, will presume that the registrar himself was absent when it was signed, and it is not necessary that that fact should either be stated on the face of the document, or be proved aliunde.[7] The certificate will be equally admissible in evidence to whomsoever it may have been given, and the registrar, on payment of 5s., is bound to issue one to any person who may apply for it.[8] Every *certificate* of the

[1] 15 & 16 Vict., c. 83, § 43. See Honiball *v.* Bloomer, 10 Ex. R. 538.
[2] 19 & 20 Vict., c. 47, § 106, r. 8. [3] § 106, r. 4.
[4] § 13, and 20 & 21 Vict., c. 14, § 33.
[5] 8 & 9 Vict., c. 113, § 1, cited ante, § 7.
[6] 19 & 20 Vict., c. 47, §§ 13, 115. As to the old law, see 7 & 8 Vict., c. 110, §§ 7, 15, 19, and The Banwen Iron Co. *v.* Barnett, 8 Com. B. 406.
[7] Baker *v.* Cave, 1 H. & N. 674. [8] 20 & 21 Vict., c. 14, § 4.

proprietorship of shares in any company registered under the same Acts, must be under the common seal of the company, and must specify the shares in the undertaking to which the shareholder is entitled; and it will then be admitted as primâ facie evidence of the title of the shareholder to the shares therein specified.[1]

§ 1456. Somewhat similar provisions are contained in the Companies Clauses Consolidation Act, as to certificates of the proprietorship of shares in undertakings subject to that Act, but it seems that these last certificates need only be sealed with the seal of the company, and need only specify the share to which the holder is entitled.[2] The same statute provides, that, where by the Special Act a company shall be restricted from borrowing money on mortgage or bond until a definite portion of their capital has been subscribed or paid up, any justice, upon production to him of the books of the company, and of such other evidence as he shall think sufficient, may grant a certificate that such capital has been subscribed or paid up, and this certificate

[1] 19 & 20 Vict., c. 47, § 21. See, as to the old law, 7 & 8 Vict., c. 110, §§ 51 & 52.

[2] 8 & 9 Vict., c. 16, § 11, enacts, that "on demand of the holder of any share the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled, and the same may be according to the form in the Schedule A. to this Act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding two shillings and sixpence."

§ 12 enacts, that "the said certificate shall be admitted in all courts as primâ facie evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

SCHEDULE A.

Form of Certificate of Share.

"Number ——. The —— Company.

"This is to certify, that A. B., of ——, is the proprietor of the share, number ——, of 'The —— Company,' subject to the regulations of the said company. Given under the common seal of the said company, the —— day of ——, in the year of our Lord ——."

will be sufficient evidence of the fact stated therein.[1] So, under the Lands Clauses Consolidation Act, no company can put in force their compulsory powers of taking land, until the whole capital has been subscribed; but their compliance with this requisite may be proved by a certificate under the hands of two justices, who are authorised to grant it on the application of the promoters, and the production of such evidence as they think sufficient.[2]

§ 1457. Under most of the Consolidation Acts passed in the session of 1847, two justices are empowered to correct any omission, mis-statement, or wrong description, respecting any lands, or the owners, lessees, or occupiers thereof, which shall be contained in the Special Act, or in the schedule thereto, or in the plans or books of reference relating to the respective undertakings governed by these Acts, provided it shall appear to such justices that the error arose from mistake; and the correction shall be embodied in a certificate which shall state the particulars of the error, and shall, along with the other documents to which it relates, be deposited with the Clerk of the Peace for the county where the lands are situate; and thereupon the undertakers may take the lands or make the works in accordance with such certificate.[3] Several of these Acts further provide, that copies of the plans and books of reference, and of the corrections or extracts therefrom, certified by the Clerk of the Peace in whose custody the documents are, shall be received in all courts of justice and elsewhere, as evidence of their contents.[4] Under the Markets and Fairs Clauses Act, two justices are also empowered to grant certificates, which shall be conclusive evidence that the works are completed and fit for public use;[5] and the Harbours, Docks, and

[1] 8 & 9 Vict., c. 16, § 10. [2] 8 & 9 Vict., c. 18, §§ 16, 17.

[3] See the Markets and Fairs Clauses Act, 1847, 10 & 11 Vict., c. 14, § 7; the Waterworks Clauses Act, 1847, 10 & 11 Vict., c. 17, § 7; Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict., c. 27, § 7; Towns Improvement Clauses Act, 1847, 10 & 11 Vict., c. 34, § 20; The Cemeteries Clauses Act, 1847, 10 & 11 Vict., c. 65, § 7. See also 10 & 11 Vict., c, 24, § 5.

[4] See 10 & 11 Vict., c. 14, § 8; id. c. 17, § 10; id. c. 27, § 10; id. c. 65, § 8. [5] 10 & 11 Vict., c. 14, § 32.

Piers Clauses Act contains a similar enactment, except only, that the certificate must be under the hand of the chairman of Quarter Sessions.[1] Again, certificates authorising railway companies to modify the construction of roads, bridges, and other engineering works, which formerly were granted by the Board of Trade, which next emanated from the Commissioners of Railways, and which now again issue from the Board of Trade, will be admitted in evidence;—the first, if they purport to have been made by, or by the authority of, the Board of Trade, and to be signed by some officer appointed for that purpose by the Board;[2]—the second, if they purport to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of the commissioners;[3]—and the last, if they purport to be signed by one of the secretaries or assistant secretaries of the Board, or by any other officer appointed by the Board to sign documents relating to railways.[4]

§ 1458. The *certificates of qualification*, granted to *apothecaries* by the Court of Examiners,[5] will be received in evidence without further proof, if they purport to be under the common seal of the London Society of Apothecaries;[6] but if this seal be not affixed, it would seem to be still necessary to authenticate the certificate by proof of the signatures of the examiners, or, at least, of some of them.[7] The certificates of due enrolment granted to *attorneys* by the registrar, and the annual stamped certificates issued by the Commissioners of Inland Revenue, authorising parties to

[1] 10 & 11 Vict., c. 27, § 26.
[2] 8 & 9 Vict. c. 20, §§ 66, 67.
[3] Id. coupled with 9 & 10 Vict., c. 105, §§ 2, 4.
[4] 14 & 15 Vict., c. 64, § 3.
[5] See ante, § 144.
[6] 14 & 15 Vict., c. 99, § 8, enacts, that "every certificate of the qualification of an apothecary, which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the City of London, shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales."
[7] See Walmsley *v.* Abbott, 3 B. & C. 218.

practise as attorneys, must be respectively signed by the registrar,[1] and by the proper officer at the Inland Revenue Office; and the former certificates must also follow the form given in the Act of 6 & 7 Vict., c. 73.[2] As no statute has expressly rendered either of these classes of certificates admissible in evidence, it would probably be deemed still necessary, notwithstanding the Documentary Evidence Act,[3] to prove the signatures and official characters of the parties signing them.[4]

§ 1459. *Surgical certificates*, which, under the Acts regulating factories and print works, are primâ facie evidence of the age of the persons named therein, would, it seems, be received in evidence without proof, provided they were drawn in the form, and purported to be signed by the persons, prescribed by these Acts.[5] Under the statutes relating to *marriages*, if any action be brought, as it may be, against a party for having *vexatiously entered a caveat*, "a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, shall be evidence that the Registrar-General has declared such caveat to have been entered on frivolous grounds, and that they ought not to obstruct the grant of the licence, or the issue of the certificate;" and the plaintiff thereupon shall recover costs and damages.[6]

§ 1460. The registrar of judgments in Ireland is required, by an Act passed in 1850, to grant a certificate under his hand of the registry or re-entry of any judgment, or revival, decree, rule, order, Crown bond, recognisance or lis pendens, or of any satisfaction, vacate, or quietus, in his office, and this certificate is made evidence of such registry or re-entry.[7]

[1] The Incorporated Law Society is the present registrar, and their secretary signs the certificates.

[2] See 6 & 7 Vict., c. 73, §§ 21—26, and Sched. 3; and 37 Geo. 3, c. 90, § 26.

[3] 8 & 9 Vict., c. 113, § 1, ante, § 7. [4] See Sparling *v.* Haddon, 9 Bing. 11.

[5] See 7 & 8 Vict., c. 15, §§ 9, 10, 53, and Sched.; and 3 & 4 Will. 4, c. 103, §§ 11—13, as to factories; and 8 & 9 Vict., c. 29, §§ 8, 9, 10, 14, 17, 19, 20, and Sched. as to print works.

[6] 7 Will. 4 & 1 Vict., c. 22, § 5; 6 & 7 Will. 4, c. 85, § 37; 7 & 8 Vict., c. 81, § 43, Ir. [7] 13 & 14 Vict., c. 74, § 10.

§ 1461. Under the Acts authorising the *registration of deeds*, conveyances, and wills, in Yorkshire and Middlesex, the respective registrars, or their deputies, if required by any person, are bound to give certificates of searches having been made among the registered memorials of those instruments,[1] as also certificates of the memorials of any judgment, statute, or recognisance registered.[2] Both these classes of certificates must be under the hand of the registrar, testified by two credible witnesses,[3] and the latter class must specify the day on which the memorial was registered, and in what book, page, and number, the same was entered.[4] Whether, since the Documentary Evidence Act,[5] it would be necessary to call either of the attesting witnesses to these documents, or otherwise to prove the signature of the registrar or his deputy, may be doubted.

§ 1462. Where deeds, memorials, or other instruments, are required by statute to be enrolled or registered, the mode of proving the enrolment or registration will depend in great measure on the language employed in the particular Act; but, perhaps, thus much may be laid down as a general rule, that where, in pursuance of the uniform practice of the office of enrolment or registration, the officer at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of enrolment or registration indorsed thereon, such certificate or memorandum will be evidence both of the fact and date of enrolment or registration, without proving the signature or official character of the person signing it.[6] This

[1] As to the West Riding, 2 & 3 Anne, c. 4, § 12; 5 Anne, c. 18, § 9; 6 Anne, c. 35, §§ 22, 34; as to the East Riding, 6 Anne, c. 35, § 22; as to the North Riding, 8 Geo. 2, c. 6, § 27; as to Middlesex, 7 Anne, c. 20, § 12.

[2] 5 Anne, c. 18, § 5; 6 Anne, c. 35, § 20; 8 Geo. 2, c. 6, § 19; 7 Anne, c. 20, § 19.

[3] See last two notes.

[4] See note last but one.

[5] 8 & 9 Vict., c. 113, § 1, cited ante, § 7.

[6] Doe *v.* Lloyd, 1 M. & Gr. 684, 685. There, a deed, requiring enrolment under the Mortmain Act, was produced at the trial, and bore the following indorsement:—"Enrolled in the High Court of Chancery the 17th of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew." The Court held that, without

doctrine has long since been applied to the enrolment of bargains and sales under the Act of 27 Hen. 8, c. 16;[1] of leases of lands within the Duchy of Lancaster;[2] and of indentures under the Mortmain Act;[3] and it seems equally applicable to the enrolment of all instruments which are now necessarily enrolled in the respective offices of the Duchies of Cornwall or Lancaster,[4] and also to a variety of other enrolments, which are rendered necessary by Act of Parliament.

§ 1463. Indeed, the same doctrine has been recognised and even extended by the Legislature with respect to all documents enrolled, either in the *Petty Bag Office*, or in the *Enrolment Office*, of the Court of Chancery; for the Act of 12 & 13 Vict., c. 109, enacts in § 12, that "the clerk of the petty bag shall, upon request, and payment of the proper fees payable in respect thereof, indorse or write upon every specification which at any time heretofore has been enrolled in the Petty Bag Office, (provided the enrolment shall then be in his custody), and upon every deed, instrument in writing, and document, which at any time heretofore has been, or at any time hereafter shall be, enrolled in the Petty Bag Office, a certificate stating that such specification, deed, instrument in writing, or document has been or was enrolled in the said Petty Bag Office, and the day of such enrolment, and shall cause such certificate to be sealed or stamped with the said Chancery Common Law Seal; and every such certificate purporting or appearing to be so sealed or stamped, shall be admitted and received in evidence as well before either House of Parliament, as also before any

proving the signature or official character of Mr. Drew, the memorandum was evidence that the deed was enrolled on the day stated, it having been *certified to the Court* by an officer of the Enrolment Office, that the memorandum was in the usual form. See ante, § 20.

[1] Kinnersley *v.* Orpe, 1 Doug. 58, per Buller, J.; recognised in Doe *v.* Lloyd, 1 M. & Gr. 685; Compton *v.* Chandless, 4 Esp. 19, per Lord Kenyon.

[2] Kinnersley *v.* Orpe, 1 Doug. 56. See 1 & 2 Geo. 4, c. 52, § 8, which requires all leases and deeds of exchange, executed under that Act, to be enrolled in the Auditor's Office.

[3] Doe *v.* Lloyd, 1 M. & Gr. 671; 1 Scott, N. R. 505, S.C.; 9 Geo. 2, c. 36.

[4] See 7 & 8 Vict., c. 65, §§ 31, 33, and 11 & 12 Vict., c. 83, § 14.

committee thereof, and also by and before all courts, tribunals, judges, justices, and other persons whomsoever, without further proof, and as sufficient primâ facie evidence that the specification, deed, instrument in writing, or document, therein mentioned, was duly enrolled in the Petty Bag Office on the day mentioned in such certificate." § 18 of the same statute contains a similar enactment, authorising the clerk of the Enrolment Office, or his deputy or assistant, to certify the due enrolment of all documents deposited in that office.[1]

§ 1464. With respect to all deeds relating to the possessions of the Crown, which are enrolled in the *land revenue office*, it is now enacted by statute, that a memorandum of enrolment on the deed, purporting to be signed by the keeper of the records and enrolments, or his deputy or assistant, shall be receiveable as sufficient evidence, not only of the enrolment, but even of the due execution of the deed, and that, too, without proof of the signature attached to it.[2] So, the statutes which

[1] The precise words of § 18, which, from some unaccountable reason, vary from those employed in § 12, are as follows:—"The Clerk of the said Enrolment Office, or his deputy or assistant, shall, upon request, and payment of the proper-fees payable in respect thereof, indorse or write upon every deed, specification, instrument in writing, and document, which at any time heretofore has been, or at any time hereafter shall be, enrolled in the said Enrolment Office, a certificate that such deed, specification, instrument in writing, or document, has been or was enrolled in Chancery, and the day on which such enrolment was made, and shall cause such certificate to be sealed or stamped with the said seal of the Chancery Enrolment Office; * and every such certificate purporting or appearing to be so sealed or stamped, shall be admitted and received in evidence by all courts and other tribunals, judges, justices, and others, without further proof, and as sufficient primâ facie evidence that the deed, specification, document, or instrument in writing therein mentioned, was duly enrolled in the Court of Chancery on the day and at the time mentioned in such certificate."

[2] 2 Will. 4, c. 1, § 26, enacts, that "where any deed or certificate, receipt, or other instrument, which shall appear to have been made, given, or executed under the authority of this Act, or of any Act heretofore passed relating to the possessions and land revenues of the Crown, shall have written thereon a memorandum of its having been enrolled in the said office of records

* This seal must be judicially noticed. See ante, § 6.

authorise the registration of deeds, conveyances, and wills, in the several ridings of Yorkshire, and in Middlesex,[1] expressly declare, that the certificates indorsed on the registered instruments, if signed by the proper officer, shall be taken as evidence of the respective registries in all courts of record;[2] and then the Documentary Evidence Act provides, that it shall be unnecessary to prove the signature or official character of the person so signing.[3]

§ 1465. Besides the mode of proving enrolments which has just been stated, it is clear that they may now be proved in most, if not in all, cases by the production of *office copies;* and by several Acts of Parliament these copies are made evidence, not only of the enrolment itself, but of the *contents of the instruments enrolled.* One of these statutes, the Charitable Trusts Act of 1855, has already been referred to in another connexion;[4]

and enrolments, and such memorandum shall purport to be signed by the Keeper of the Records and Enrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed, certificate, receipt, or other instrument having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed, and of its having been duly enrolled as stated by such memorandum, and of the provisions of the Act, under which the same shall appear to have been made, granted, given, or executed, having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto." See 16 & 17 Vict., c. 56, § 6.

[1] As to the West Riding, see 2 & 3 Anne, c. 4; 5 Anne, c. 18; 6 Anne, c. 35, § 34; as to the East Riding, see 6 Anne, c. 35; as to the North Riding, see 8 Geo. 2, c. 6; and as to Middlesex, see 7 Anne, c. 20; 25 Geo. 2, c. 4.

[2] For instance, the Act of 2 & 3 Anne, c. 4, enacts, in § 8, that "the register or his deputy, at the time of entering such memorial, shall indorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time on which such memorial is so entered and registered, expressing also in what book, page, and number the same is entered, and that the said register or his deputy, shall sign the said certificate when so indorsed; which certificates shall be taken and allowed as evidence of such respective registries in all courts of record whatever." The same clause is re-enacted in 6 Anne, c. 35, § 11; 7 Anne, c. 20, § 6; and 8 Geo. 2, c. 6, § 12. See also 2 & 3 Anne, c. 4, § 18; 5 Anne, c. 18, 2; 6 Anne, c. 35, § 17; and 8 Geo. 2, c. 6, §§ 21, 22.

[3] 8 & 9 Vict., c. 113, § 1, cited ante, § 7.

[4] 18 & 19 Vict., c. 124, § 42, cited ante, § 1030, n. 4.

and another Act is that, just cited,[1] of 12 & 13 Vict., c. 109, which enacts, in § 17, that "every document or writing sealed or stamped, or purporting or appearing to be sealed or stamped, with the said seal of the Chancery Enrolment Office, and purporting to be a *copy* of any enrolment or other record, or of any other document or writing of any description whatsoever, including any drawings, maps, or plans thereunto annexed or indorsed thereon, shall be deemed to be a true copy of such enrolment, record, document, or writing, and of such drawing, map, or plan, if any, thereunto annexed, and shall without further proof, be admissible and admitted in evidence, as well before either House of Parliament, as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner, and to the same extent and effect as the original enrolment, record, document, or writing, could or might be admissible or admitted in evidence, as well for the purpose of proving the contents of such enrolment, record, document, or writing, and the drawing, map, or plan, if any, thereunto annexed, as also proving such enrolment, record, document, or writing to be an enrolment, record, document, or writing, of, or belonging to, the said Court of Chancery; and that such enrolment, record, document, or writing, was made, acknowledged, prepared, filed, or entered on the day, and at the time, when the original enrolment, record, document, or writing shall purport to have been made, acknowledged, prepared, filed, or entered."

§ 1466. Another salutary example of this mode of proof is afforded by the Act of 11 & 12 Vict., c. 83, which relates, among other things, to the mode of proving documents enrolled in the respective Duchies of Cornwall and Lancaster. That Act, by § 6, enacts, that "where any deed, certificate, receipt, or other instrument relating to the lands or possessions of the Duchy of Cornwall, shall have been duly enrolled in the office of the said Duchy, the enrolment in the books of the said office, or an examined copy of such enrolment, or a certificate purporting to set forth a true copy of the whole or part thereof, and purporting

[1] Ante, § 1463.

to be signed and certified by the Keeper of the Records of the Duchy for the time being, shall, in the absence of evidence to the contrary, and without producing the original, or calling any attesting witness, and (in the case of a certified copy) without proof, other than the production of such certificate, that such certified copy is in fact a true copy, be admitted by and before all courts and justices, and in all legal proceedings, to be proof of such original instrument or enrolment thereof, or of so much thereof as the said certified copy purports to set forth, and that the original was duly made, granted, given, or executed by the parties thereto." § 14 of the same Act extends the provisions just set out to all instruments enrolled in the Duchy of Lancaster since the 31st of August, 1848.

§ 1467. Again, under the Act of 2 & 3 Will. 4, c. 87, which is one of the statutes regulating the office at Dublin for the registration of deeds, conveyances, and wills in Ireland, office copies of the memorials registered are rendered admissible in evidence under certain restrictions; for § 32 of that statute enacts, that "in all proceedings before any court of justice for all purposes whatsoever, an office copy of any memorial registered in the said office, shall, upon such office copy being proved in like manner as an office copy of any other record, be received and taken as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original memorial: provided always, that the party producing such office copy shall, if out of Dublin ten days, and if in Dublin eight days, before producing the same, give notice in writing to the adverse party thereof; and provided also, that such adverse party shall not within four days after receiving such notice, demand by a counter notice that the original memorial shall be produced; and in every case in which such counter notice shall be given, the costs of producing the original memorial shall be paid by either party, as the court in which the proceeding shall take place, or the taxing officer of such court, may determine." The Act, too, passed in 1850, for amending the laws for the registration of assurances of lands in Ireland,[1] further enacts, in

[1] 13 & 14 Vict., c. 72.

§ 47, that "the registrar shall cause to be provided for any person applying for the same, copies or extracts from any document which has been deposited in the said Register Office under this Act; and in every case when a copy or extract is so provided, the seal of the said Register Office shall be impressed on each sheet of such copy or extract; and a certificate signed by the proper officer of the said Register Office, shall be written at the head, or in the margin of such copy or extract, or shall be indorsed on the same, which certificate shall contain a statement that the copy or extract on which the same is written is an examined copy of, or extract from, a document deposited in the said Register Office, and shall specify the book or parcel in which such document is made up, and the number of such document in such book or parcel; and every document so sealed, with such certificate thereon, containing such statement and purporting to be so signed as aforesaid, shall be evidence that such document is a copy or extract from a document deposited in the said Register Office, and made up in the book or parcel specified in such certificate, and numbered in such book or parcel as in such certificate is expressed, and of the contents of the document deposited in the said Register Office, or of such part thereof as is purported to be extracted." An assignment of a judgment in Ireland may be proved by an examined copy of the enrolment of the memorial,[1] and a certified copy of such enrolment would probably be also admissible.[2]

§ 1468. Doubts may possibly be entertained whether *office* copies of the enrolments of bargains and sales in the several ridings of Yorkshire can be received in evidence, under the old statutes of Queen Anne and King George II.;[3] but if they cannot,

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[1] Fitzgerald *v.* Fitzgerald, 8 Com. B. 592; Hobhouse *v.* Hamilton, 1 Sch. & Lef. 207; 9 Geo. 2, c. 5, Ir.; 25 Geo. 2, c. 14, Ir.; 12 Geo. 3, c. 19, § 3, Ir. [2] See ante, § 1437.

[3] 5 Anne, c. 18, § 2, enacts, that "all deeds of bargain and sale so enrolled in the said public or register office as aforesaid, which shall appear to be so enrolled by an indorsement or certificate on the said deeds of bargain and sale signed by the said register or his deputy, and *all copies* of the enrolments thereof remaining on record in the said register office, shall be allowed in all courts where such bargains and sales or copies shall be produced, to be as good and sufficient evidence as any bargains and sales enrolled in any of

it seems clear that the enrolments, as being records, may, by virtue of § 14 of Lord Brougham's Act of 1851, be proved either by examined or by certified copies.[1] In some few cases, where the copy of the enrolment is made evidence, not only of the enrolment itself, but of the *contents* of the *instruments* enrolled, such copy must combine the requisites, both of an *office*, and of an *examined, copy*. For instance, the Act of 5 & 6 Vict., c. 94, which empowers the principal officers of her Majesty's Ordnance to enrol in the Exchequer or in Chancery[2] all deeds, decrees, evidences, writings or other instruments, relating to the lands and hereditaments vested in them, enacts, in § 33, that a copy of the enrolment of every such document "signed by the proper officer having the custody of such enrolment, and proved upon oath to be a true copy," shall, for every purpose, be sufficient evidence of the contents of such document in all courts of law and equity, and on every other occasion shall be of the same force and effect as such document would be, if produced. In other cases the copies, to be admissible even as secondary evidence, must be *attested*. Thus, the Act of 8 Geo. 2, c. 6,—which, among other things, empowers persons claiming title to real estate in the North Riding of Yorkshire to register at full length the deeds, writings, wills, or conveyances, under which they claim,—enacts, that all copies of the enrolments of such instruments, signed by the registrar or his deputy, and attested by two or more witnesses, shall be allowed in all courts of record to be sufficient evidence of such deeds, writings, wills, or conveyances, in the event of the originals being destroyed by fire or other accident.[3]

§ 1469. The mode of proving *by-laws*[4] varies according to

the courts at Westminster, and the copies of the enrolments thereof." A similar clause is contained in § 17 of 6 Anne, c. 35, and § 21 of 8 Geo. 2, c. 6. Qu. whether the "copies" spoken of mean office copies or examined copies.

[1] See ante, § 1437.

[2] Where documents have been enrolled in Chancery under this Act, the provisions stated in the text have been superseded by 11 & 12 Vict., c. 94, § 17; they still, however, operate, where the instrument has been enrolled in the Exchequer.

[3] § 22.

[4] As to when by-laws will be inferred from long usage, see ante, § 112.

the particular language of the statute or charter, under the authority of which they have been made. For instance, the Companies Clauses Consolidation Act empowers every company to which that Act applies, to make by-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs;[1] and the production of a written or printed copy *purporting* to have the *seal of the company affixed* thereto, "shall be sufficient evidence of such by-laws in all cases of prosecution under the same."[2]

§ 1470. With respect to such by-laws as any *railway company* is empowered to make for regulating the travelling upon, or using and working the railway, or for imposing penalties upon *persons other than its servants*, it would seem that, before they can be enforced, the company must produce a copy purporting to be under its seal, and must show that a certified copy has been sent to the Board of Trade,—or, from the 9th of November, 1846,[3] to the 10th of October, 1851,[4] to the Commissioners of Railways,—

[1] 8 & 9 Vict., c. 16, § 124 enacts, that "it shall be lawful for the company from time to time to make such by-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such by-laws, and make others, provided such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the Special Act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such by-laws shall be given to every officer and servant of the company affected thereby." § 125 enacts, that "it shall be lawful for the company, by such by-laws, to impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such by-laws, as the company shall think fit, not exceeding five pounds for any one offence." § 126 enacts, that "all the by-laws to be made by the company shall be so framed as to allow the justice, before whom any penalty imposed thereby may be sought to be recovered, to order a part only of such penalty to be paid, if such justice shall think fit."

[2] § 127; 8 & 9 Vict., c. 113, § 1, cited ante, § 7; qu. whether the same proof would suffice, where the by-laws were offered in evidence by the company, in defending an action for false imprisonment.

[3] 9 & 10 Vict., c. 105, § 2; Gazette of Friday, 6th of Nov., 1846.

[4] When the Act appointing Commiss. of Rail. was abolished. See 14 & 15 Vict., c. 64, § 1.

and has been allowed, or, at least, not disallowed, by these respective bodies;[1] and further, that the by-laws have been duly published; but for this last purpose it will be sufficient to prove, that a printed paper or painted board, containing a copy, was affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature of the respective by-laws, and in case of its being afterwards displaced or damaged, then, that such paper or board was replaced as soon as conveniently might be.[2] In many of the earlier Railway Acts a clause was introduced, which rendered it necessary to obtain the sanction of certain justices or other persons to the by-laws made by the company, but the Act of 3 & 4 Vict., c. 97, enacts in § 10, that "so much of every clause, provision, and enactment in any Act of Parliament heretofore passed, as may require the approval or concurrence of any justice of the peace, court of Quarter Sessions, or other person or persons, other than members of the said companies, to give validity to any by-laws, orders, rules, or regulations made by any such company, shall be repealed."

§ 1471. The by-laws made by the Corporation of London in pursuance of certain Acts[3] for regulating the Port of London and the vend and delivery of coals, may be proved by the production of a printed or written copy purporting to be signed by the *town clerk* of the city of London, and such copy "shall, without any other proof, be admitted as evidence of such by-laws, and of the making, submission, allowance, and publication thereof, unless the contrary shall be proved."[4] So, the by-laws made by the commissioners for the registration and regulation of *coalwhippers* in the Port of London, may be proved by a copy purporting to be authenticated by the signature of *the chairman of the commis-*

[1] Compare 3 & 4 Vict., c. 97, §§ 7—10, and 8 & 9 Vict., c. 20, §§ 108—111. As to proof of the order of the Board of Trade, allowing the by-laws, see ante, p. 1291, n. 1; and, as to proof of a similar order by Commiss. of Rail. see ante, p. 1278, n. 1.

[2] 8 & 9 Vict., c. 20, §§ 110, 111.

[3] 10 Geo. 4, c. cxxiv.; 1 & 2 Will. 4, c. lxxvi.; 1 & 2 Vict., c. ci.; 8 & 9 Vict., c. 101.

[4] 8 & 9 Vict., c. 101, §§ 6, 7; and 8 & 9 Vict., c. 113, § 1, cited ante, § 7.

sioners, and this copy "shall, without any further proof, be received as evidence of the by-law or regulation of which it purports to be a copy, and of such by-law or regulation having been duly made, submitted, issued, and published."[1] So, the production of a printed copy of the by-laws made by the Metropolitan Board of Works, or by a district board, or vestry, under the Metropolis Local Management Act of 1855, "if authenticated by the seal of the board or vestry, shall be evidence of the existence, and of the due making, confirmation, and publication of such by-laws, in all prosecutions under the same, without adducing proof of such seal, or of the fact of such confirmation or publication of such by-laws."[2] So, any by-law made by the Municipal Corporation of Dublin may be proved by a copy under the corporate seal, provided it contain a declaration signed by the Lord Mayor that the by-law has been duly made, published, and allowed, and is still in force.[3] Again, the rules and by-laws made by the Board of Trade for the protection of the Channel fisheries, printed copies of which are deposited with the clerks of the peace for the counties on the eastern coast, may, for the purpose of convicting any person offending against the same, be proved by the production of a printed copy obtained from the office of any clerk of the peace with whom the same may be lodged, and purporting to be certified by him as a true copy; and such copy shall be evidence, not only of such rules and by-laws, but of their due publication.[4] The rules and by-laws made by trustees of docks, under the Passengers Act, 1855, for regulating the embarkation and landing of emigrants, and for licensing emigrant porters, are subject to a different mode of proof; for their validity depends on the approval of a Secretary of State, who must authorise their publication in the "London Gazette," "which publication shall for all purposes be deemed conclusive evidence of such rules and by-laws, and of the approval thereof by such Secretary of State."[5]

§ 1472. The Municipal Corporation Act, which empowers

[1] 14 & 15 Vict., c. 78, § 29.
[2] 18 & 19 Vict., c. 120, § 203.
[3] 12 & 13 Vict., c. 97, § 20.
[4] 6 & 7 Vict., c. 79, § 5.
[5] 18 & 19 Vict., c. 119, § 82.

borough councils to make by-laws, contains no provision for their proof when made. In order, therefore, to prove them, it would seem to be necessary, not only to produce a copy under the corporate seal, but to show that they were made at some meeting of the council at which two-thirds of the members were present;—that a minute of their having been made was duly entered in the book of proceedings, and was signed by the chairman of the meeting;—that they were legally published, by being affixed on the door of the Town Hall or other public place;—that a copy properly sealed was transmitted to one of the Secretaries of State;—and that they were not disallowed within forty days after such copy had been sent.[1]

§ 1473.[2] The ADMISSIBILITY AND EFFECT OF PUBLIC DOCUMENTS, as instruments of evidence, will next be considered. And here, following the same course which was pursued, when explaining in what manner public documents might be proved, attention will *first* be drawn to *Statutes*, *State Papers*, and other writings of a cognate character. With respect to these documents, it may be generally observed, that, provided they have been duly authenticated in some one of the modes stated above, and their contents be pertinent to the issue, they will be admissible, either as primâ facie or as conclusive proof of the facts directly stated in them; and in many cases they will be received in evidence even of such matters as are inserted in them by way of introductory *recital.* Thus, where certain *public statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of

[1] 5 & 6 Will. 4, c. 76, §§ 90, 69. As to pleading such by-laws, see Elwood *v.* Bullock, 6 Q. B. 384—388. For other enactments respecting the making and proof of by-laws, see "The Irish Municipal Corporation Act," 3 & 4 Vict., c. 108, §§ 125—127; "The Markets and Fairs Clauses Act, 1847," 10 & 11 Vict., c. 14, §§ 42—49; "The Commissioners Clauses Act, 1847," id. c. 16, §§ 96—98; "The Harbours, Docks, and Piers Clauses Act, 1847," id. c. 27, §§ 83—90; "The Towns Improvement Clauses Act, 1847," id. c. 34, §§ 200—207; and "The Town Police Clauses Act, 1847," id. c. 89, § 71.

[2] Gr. Ev., § 491, in some part.

those outrages, to support the averments to that effect in an information for a libel on the government in relation thereto. So, a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without proof, whether this nation be or be not a party to it.[2] So, a recital of relationship, even in a *private* Act, has been received by the House of Lords as cogent evidence of pedigree in a peerage case; because such recital is never inserted in a private Act, unless its truth has first been ascertained by the judges, to whom the bill has been referred.[3] But, in general, a local or private statute, though it contains a clause requiring it to be judicially noticed, is not, as against *strangers*, any evidence of the facts recited;[4] neither does it affect the public with a knowledge of its contents.[5] The recitals, too, in a public Act are not conclusive evidence; and, therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false.[6]

§ 1474.[7] The *Speech of the Sovereign* in opening Parliament, and the Addresses of either House to the Crown, would seem to be evidence, in the nature of reputation, of the public matters they recite.[8] The *Journals*, also, of either House are the proper evidence of the action of that House upon all matters before it, whether legislative, ministerial, or, in the Lords' House, judicial.[9] The committee of privileges has even admitted an entry in their Journals as evidence of limitations in a patent of peerage, without requiring the production of the patent.[10] So, a foreign declaration

[1] R. v. Sutton, 4 M. & Sel. 532.
[2] R. v. De Berenger, 3 M. & Sel. 67, 69.
[3] Wharton Peer., 12 Cl. & Fin. 302.
[4] Brett v. Beales, M. & M. 421; Taylor v. Parry, 1 M. & Gr. 604, 619, 622; Duke of Beaufort v. Smith, 4 Ex. R. 450, 470; Cowell v. Chambers, 21 Beav. 619.
[5] Ballard v. Way, 1 M. & W. 529, per Lord Abinger.
[6] R. v. Greene, 6 A. & E. 548.
[7] Gr. Ev., § 491, slightly.
[8] R. v. Francklin, 17 How. St. Tr. 636—638.
[9] Jones v. Randall, 1 Cowp. 17; Root v. King, 7 Cowen, 613.
[10] Lord Dufferin's case, 4 Cl. & Fin. 568; Saye & Selè Peer., 1 H. of L. Cas. 507, 510.

of war, transmitted by the British Ambassador to the Secretary of State's office, and produced by a clerk from that office, is sufficient evidence to prove the date of the commencement of hostilities between two foreign states.[1] How far *diplomatic correspondence* may go to establish the facts recited, does not clearly appear;[2] but, in America, such correspondence, communicated by the President to Congress, has been held sufficient evidence of the acts of foreign governments and functionaries therein narrated;[3] and in that country, it seems to be generally admissible, whenever the facts recited are not the principal points in issue, but are required to be proved, merely in order to support some introductory averment in the pleadings.[4]

§ 1475.[5] The government *Gazette* is admissible and sufficient evidence of such acts of State, as are usually announced to the public through that channel, such as proclamations, addresses received by the Crown, and the like.[6] For, besides the motives of official duty, and self-interest, which bind the publisher to accuracy, it must be remembered, that, intentionally to publish anything as emanating from public authority, with knowledge that it did not so emanate, would be a misdemeanor.[7] But in regard to other acts of public functionaries, having no relation to the affairs of government, such as an order in council for the division of a parish under the Act of 58 Geo. 3, c. 45,[8]—the appointment of an officer to a commission in the army,[9]—or the Queen's grant of land to a subject,[10]—the Gazette cannot in general be read in evidence.

[1] Thelluson *v.* Cosling, 4 Esp. 266.

[2] See R. *v.* Francklin, 17 How. St. Tr. 638.

[3] Radcliff *v.* Un. Ins. Co., 7 Johns. 38, 51; Talbot *v.* Seeman, 1 Cranch, 1, 37, 38.

[4] Radcliff *v.* Un. Ins. Co., 7 Johns. 51, per Kent, C. J.

[5] Gr. Ev., § 492, in great part as to first ten lines.

[6] R. *v.* Holt, 5 T. R. 436, 443; Att.-Gen. *v.* Theakstone, 8 Price, 89; Picton's case, 30 How. St. Tr. 493; Van Omeron *v.* Dowick, 2 Camp. 44; B. N. P. 226.

[7] 2 Ph. Ev. 108; 5 T. R. 442, A. G. arguendo, citing Lord Holt.

[8] Greenwood *v.* Woodham, 2 M. & Rob. 363, per Wightman, J.

[9] R. *v.* Gardner, 2 Camp. 513, per Lord Ellenborough; Kirwan *v.* Cockburn, 5 Esp. 233, per id.

[10] R. *v.* Holt, 5 T. R. 443, per Lord Kenyon.

§ 1476. In some few cases, indeed, the Legislature has interposed, and expressly made this paper evidence of certain facts, which are directed to be published in it. For instance, the *statutes*, which respectively regulate the issue of bank notes in England and Ireland, after requiring the Commissioners of Stamps and Taxes to publish in the London and Dublin Gazettes respectively certificates containing certain particulars, enact that the Gazette, in which such publication shall be made, shall be conclusive evidence in all courts of the amount of bank notes, which the banker named in the certificate is by law authorised to issue and have in circulation;[1] the Irish Act adding, "exclusive of an amount equal to the monthly average amount of the gold and silver coin held by such banker as herein provided." So, the Act for facilitating the dissolution of certain railway companies, enacts, that the chairman at every meeting, convened for the purpose of deciding on the dissolution or bankruptcy of the company, shall sign a minute of the proceedings; and the Gazette containing the advertisement of such minute, shall be evidence of the meeting having been duly called and held, and of the resolutions recorded having been duly passed by the majorities therein mentioned.[2] So, under the "Joint Stock Companies Winding-up Act, 1848," a copy of the London or Dublin Gazette, containing any advertisement by that Act directed or authorised to be made therein respectively, is evidence of any matter therein contained, and of which notice is by the Act directed or authorised to be given by such advertisement.[3]

§ 1477. Again orders of the privy council, and directions and regulations of the General Board of Health, made under the "Diseases-Prevention Act, 1855," are directed to be published respectively in the London Gazette; and such publication is made conclusive evidence of the orders, directions, or regulations so published, to all intents and purposes.[4] So, orders in council for securing order, cleanliness, ventilation, and health on board of

[1] 7 & 8 Vict., c. 32, § 15; 8 & 9 Vict., c. 37, § 10, Ir.
[2] 9 & 10 Vict., c. 38, § 16.
[3] 11 & 12 Vict., c. 45, § 110. See 12 & 13 Vict., c. 108.
[4] 18 & 19 Vict., c. 116, §§ 5, 7.

"Passenger Ships," may be proved by the London Gazette, as well as by copies purporting to be printed by the Queen's printer.[1] So, any printed copy of the London Gazette, purporting to be printed and published by the authorised person, must be admitted as evidence of any Treasury warrant issued by virtue of the Post Office Acts,[2] "and contained in any such Gazette, and of the due issuing thereof, and of the rates and regulations contained in any such warrant having been duly made and established, and of the other contents of any such warrant, without any further or other proof of such warrant."[3] So, the due publication of final notices, under the Acts relating to the drainage of lands in Ireland,[4] may be conclusively proved by the production of the Dublin Gazette, in which they shall be published.[5] So, if a bankrupt does not dispute the fiat or petition for adjudication within the prescribed period after the advertisement of the bankruptcy in the Gazette, this advertisment, provided the adjudication has been made since the 11th of November, 1842,[6] is, as against him, and all persons, whom but for the bankruptcy he might have sued, conclusive evidence of the fact of bankruptcy, and of the date of the fiat or petition.[7]

[1] 18 & 19 Vict., c. 119, § 59. See also § 82 of the same Act, cited ante, § 1471.

[2] 3 & 4 Vict., c. 96; 7 & 8 Vict., c. 49; 10 & 11 Vict., c. 85; 11 & 12 Vict., c. 88, § 7.

[3] 10 & 11 Vict., c. 85, § 19. See also 18 & 19 Vict., c. 27, § 11.

[4] 5 & 6 Vict., c. 89, Ir.; 8 & 9 Vict., c. 69, Ir.; 9 & 10 Vict., c. 4, Ir.; 10 & 11 Vict., c. 79, Ir.

[5] 10 & 11 Vict., c. 79, § 4.

[6] Edwards *v.* Sherren, 11 M. & W. 595.

[7] 12 & 13 Vict., c. 106, § 233, which enacts, that, "if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette containing such advertisement* shall be *conclusive* evidence in all cases as against such bankrupt, and in all actions at law or suits in equity, brought by the assignees for any debt or demand, for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and

§ 1478. Gazettes, in common with all other *newspapers*, are frequently offered in evidence, with the view of fixing an adversary with *knowledge* of certain facts advertised therein; but here it is always advisable, and sometimes necessary, unless the case is governed by a special Act of Parliament, to furnish *some* evidence, from which the jury may infer that the party sought to be affected by the notice has read it. This doctrine applies even to cases, where the notice published in the Gazette relates to some public matter, as, for instance, the blockade of a foreign port; for although, as between nation and nation, the notification of a blockade may, from the moment it is made by one State to the government of another, bind all the subjects of the latter,[1] this rule will not extend to suits between private individuals. Therefore, where an action was brought on a ship policy, and the underwriters urged in defence, that the voyage was to a port which the master knew was blockaded, and that consequently the policy was void, the Court held that the jury were justified in negativing any knowledge on the part of the master, though it appeared that he was in this country some time after the publication of the Gazette in which the blockade was notified.[2]

§ 1479. The Gazette containing a *notice of dissolution of partnership* will, indeed, be admissible without any additional proof, as against all persons who have had no previous dealings with the firm;[3] and even against those who have had such dealings, it will

suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date." § 240 also enacts, that "a copy of the London Gazette, and of any newspaper containing any such advertisement, as is by this Act directed or authorised to be made therein respectively, shall be evidence of any matter therein contained, and of which notice is by this Act directed or authorised to be given by such advertisement; and all proceedings or notices required by this Act to be inserted in the London Gazette shall be marked with the seal of the Court from which such proceedings or notices shall be issued, and certified by one of the registrars of the said Court." The Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict., c. 60, contains somewhat similar provisions in §§ 358, 364.

[1] Neptunus, 2 Rob. Adm. R. 110, per Sir W. Scott; Adelaide, id. 112, n.

[2] Harratt v. Wise, 9 B. & C. 712.

[3] Godfrey v. Turnbull, 1 Esp. 371, per Lord Kenyon; Newsome v. Coles,

after formal proof of the actual dissolution by producing the deed, be evidence to show that the partnership was openly dissolved. Still, in order to deprive the old correspondents of the firm of their right of action against the retiring partner, further evidence must be given than the mere production of the Gazette in which notice of dissolution has been inserted;[2] and if the defendant be not in a condition to prove that a circular was sent in due course to the plaintiff, he must at least show facts, from which an inference may be drawn that the plaintiff has seen the notice. This may be done in a variety of ways, as by proving that the plaintiff has been in the habit of taking in the Gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership, and the like.[3] But it seems not enough to prove that the newspaper was circulated in the immediate neighbourhood of the plaintiff's residence.[4]

§ 1480. The *admissibility and effect of judicial records* and documents must now be considered; and first, as to *judgments*. Here, if the object be merely to prove the *existence of the judgment, its date*, or *its legal consequences*, the production of the record, or the proof of an examined copy, is conclusive evidence of the facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded. Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive

2 Camp. 617, per Lord Ellenborough; Wright *v.* Pulham, 2 Chit. R. 121; Hart *v.* Alexander, 7 C. & P. 753, per Lord Abinger.

[1] Hart *v.* Alexander, 7 C. & P. 749, per Lord Abinger.

[2] Graham *v.* Hope, 1 Pea. R. 154, per Lord Kenyon.

[3] Godfrey *v.* Macauley, 1 Pea. R. 155, n.; Jenkins *v.* Blizard, 1 Stark. R. 419, per Lord Ellenborough; Hart *v.* Alexander, 2 M. & W. 484; Leeson *v.* Holt, 1 Stark. R. 186. As to notices by carriers restricting their liability, see 11 Geo. 4, & 1 Will. 4, c. 68; Munn *v.* Baker, 2 Stark. R. 255; Rowley *v.* Horne, 3 Bing. 2. As to similar notices by Railway or Canal Companies, see 17 & 18 Vict., c. 31, § 7.

[4] Norwich and Lowestoft Navig. Co. *v.* Theobald, M. & M. 153, per Lord Tenterden.

evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment;[1] but it is no evidence whatever, that the defendant was the prosecutor, even though his name appear on the back of the bill,[2] or of his malice, or of want of probable cause;[3] and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt.[4] So, a judgment against a master or principal for the negligence of his servant or agent, is conclusive evidence against the servant or agent of the fact, that the master or principal has been compelled to pay the amount of damages awarded; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent.[5] So, a judgment recovered against a surety will be evidence for him, to prove the amount which he has been compelled to pay for the principal debtor; but it furnishes no proof whatever of his having been legally liable to pay that amount through the principal's default.[6] The same doctrine will apply to other cases, where the party has a remedy over, as for contribution, or the like.[7] In an action against a surety, where the defence was that the plaintiff had received certain moneys from the principal in satisfaction of his damages, it was held that the plaintiff, on traversing this plea, might put in evidence a judgment recovered from him by the assignees of the principal for the amount so received as money had to their use, not indeed as conclusive proof that the money had been paid to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees, and as generally explaining the transaction.[8]

§ 1481. If the object be to discredit a witness, by proving that

[1] Legatt *v.* Tollervey, 14 East, 302. [2] B. N. P. 14.

[3] Purcell *v.* Macnamara, 9 East, 361; 1 Camp. 199, S. C.; Incledon *v.* Berry, 1 Camp. 203, n. *a.* [4] B. N. P. 15.

[5] Green *v.* New River Co., 4 T. R. 590; Pritchard *v.* Hitchcock, 6 M. & Gr. 165, per Cresswell, J.; Tyler *v.* Ulmer, 12 Mass. 166, per Parker, C. J. [6] King *v.* Norman, 4 Com. B. 884, 898.

[7] Powell *v.* Layton, 2 N. R. 371, per Mansfield, C. J.; Kip *v.* Brigham, 6 Johns. 158; 7 Johns. 168; Griffin *v.* Brown, 2 Pick. 304.

[8] Pritchard *v.* Hitchcock, 6 M. & Gr. 151.

he has given different testimony on a former trial, the judgment in that cause, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statements.[1] So, upon an indictment for perjury committed on a trial, the record will be evidence to show that such a trial was had;[2] and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody, will be conclusive evidence that the prisoner was convicted of the crime stated therein.[3] So, in an action against a sheriff for an escape, or for other neglect in regard to an execution, it is usual to give in evidence judgments against third persons, to show the character in which the plaintiff claims, and the amount of damage he has sustained.[4] So, if A. sues the sheriff for trespass to his goods, the latter may give in evidence a judgment against B., and then show that he seized the goods by virtue of a fieri facias upon that judgment, and that the goods belonged to B.[5] So,[6] where the judgment constitutes one of the muniments of a party's title to land or goods,—as where a deed was made under a decree in Chancery,[7] or goods were purchased at a sale made by a sheriff upon an execution,[8]—the record may be given in evidence against a party who is a stranger to it. So, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father, through whom the defendant claimed, had

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[1] Clarges v. Sherwin, 12 Mod. 343; Foster v. Shaw, 7 Serg. & R. 156.

[2] R. v. Iles, Cas. temp. Hardw. 118; B. N. P. 243; R. v. Hammond Page, 2 Esp. 649, n.

[3] R. v. Shaw, R. & R. 526. A certificate of the conviction would also be evidence. See ante, § 1445.

[4] Davies v. Lowndes, 1 Bing. N. C. 607, per Tindal, C. J.; Adams v. Balch, 5 Greenl. 188.

[5] 1 St. Ev. 255.

[6] Gr. Ev. § 539, as to three lines.

[7] Barr v. Gratz, 4 Wheat. 213.

[8] 1 St. Ev. 255; Witmer v. Schlatter, 2 Rawle, 359; Jackson v. Wood, 3 Wend. 27, 34; Fowler v. Savage, 3 Conn. 90, 96.

afterwards taken actual possession of the estate.[1] Many other instances might be given of the admissibility of judgments inter alios, where the *record is matter of inducement*, or merely introductory to other evidence; but those cited will suffice to illustrate the principle.

§ 1482. Adjudications are sometimes tendered in evidence for the purpose of *protecting* the magistrates who pronounced, and the officers who enforced, them, against an action of trespass. And here the rule of law is, that, provided the adjudication, when read in connexion with the other proceedings, shows, either expressly or by fair and necessary inference, that the judge had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if these facts are necessary to give the judge jurisdiction;[2] or, perhaps, it may be more correctly stated, that the production of the judgment and of the proceedings on which it is founded, will be a bar to all inquiry respecting the truth or falsehood of the facts stated, and will conclusively establish the immunity of the judge.[3] The above doctrine, which is essential to the administration of the law,—since, without it, who would be found so bold as to act as a magistrate?—is occasionally prayed in aid for the protection of judges of even courts of record; because, although by an excellent law of very great antiquity, no action will lie against such personages for an erroneous judgment, or for any other act done by them in the exercise of their judicial functions, and within the general scope of their jurisdiction,[4]—yet this protection does not extend to cases, where the judge, either wilfully, or under a mistake not

[1] Davies v. Lowndes, 6 M. & Gr. 471, 520; 1 Bing. N. C. 607; 1 M. & G. 474, S. C.

[2] See and compare Taylor v. Clemson, 2 Q. C. 1031, 1032, per Tindal, C. J., delivering the judgment of Ex. Ch.; Basten v. Carew, 3 B. & C. 652, 653, per Lord Tenterden; Brittain v. Kinnaird, 1 B. & B. 437, per Dallas, C. J.; 442, 443, per Richardson, J.; Betts v. Bagley, 12 Pick. 572, 582, per Shaw, C. J.

[3] Aldridge v. Haines, 2 B. & Ad. 408, per Parke, J.; 1 St. Ev. 255.

[4] Garnett v. Ferrand, 6 B. & C. 611, 625, per Lord Tenterden; 9 D. & R. 657, S. C.; Floyd v. Barker, 12 Co. 24.

of fact but of law, acts wholly without jurisdiction.[1] Still, the rule in question, though sometimes available on occasions of greater importance, is generally applied to, and will certainly be best illustrated by, those cases, in which justices of the peace have been sued by parties who imagined themselves wronged by a conviction or order.

§ 1483. Brittain *v.* Kinnaird,[2] is a leading authority on this subject. That was an action of trespass against magistrates for taking and detaining a vessel. At the trial it appeared that the vessel was seized by the defendants, as magistrates, under the Bum-boat Act now repealed,[3] and the plaintiff sought to prove that it was not a boat within the meaning of the Act; but this he was not permitted to do, on the ground that the conviction was the only evidence of what the magistrates had determined. The conviction was then put in, and as no defects appeared upon the face of it, and as the vessel was there called a boat, it was held to constitute a conclusive defence to the action, and the plaintiff was accordingly nonsuited. On a motion for a new trial, it was strongly urged that the magistrates had no right to assume to themselves jurisdiction, by calling that a boat which was in fact a ship; and it was asked whether a justice could seize a seventy-four gun vessel, and then justify the illegal detention by describing it in the conviction as a boat. To this it was answered by the Court, that supposing such a thing done, the conviction would still be conclusive, and the party would be without civil remedy, though a decision so gross would undoubtedly be good ground for a criminal proceeding against the justice;[4] and Richardson, J., observed, "whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide, and the fallacy is in assuming, that the fact which the magistrate has to decide is that

[1] Houlden *v.* Smith, 14 Q. B. 841; Calder *v.* Halket, 3 Moo. P. C. R. 28.

[2] 1 B. & B. 432. In Mould *v.* Williams, 5 Q. B. 473, Coleridge, J., observed, "Brittain *v.* Kinnaird has been oftener recognised than almost any modern case." See Ayrton *v.* Abbott, 14 Q. B. 1.

[3] 2 Geo. 3, c. 28; repealed by 2 & 3 Vict., c. 47, § 24.

[4] 1 B. & B. 438, 439; cited with approbation by Coleridge, J., in R. *v.* Buckinghamshire Js., 3 Q. B. 809.

which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction."[1]

§ 1484. Again, where a justice acting under the Highway Act,[2] had issued an order for the removal of certain timber encumbering the highway, and an action of trespass was in consequence brought against him by the owner of the timber, it was held that the plaintiff could not prove, in contradiction to the order, that the place where the wood was lying was no part of the highway.[3] So, where two magistrates were sued in trespass for having given the plaintiff's landlord possession of a farm as a deserted farm, under the Act 11 Geo. 2, c. 19, § 16, the production of the record of their proceedings, which set forth the facts necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, was held to be a conclusive answer to the action, and the plaintiff, consequently, was not permitted to prove that the farm, in point of fact, was not deserted.[4] Many other cases might be cited in support of the general proposition, that where (supposing the facts alleged to be true) a magistrate or other judicial personage has jurisdiction, his jurisdiction, and consequent immunity from an action, cannot be made to depend upon the truth or falsehood of those facts, or on the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.[5]

§ 1485. It must be carefully remembered, that this rule *protects justices*, only when acting in a *judicial* capacity. Therefore, if an action of trespass be brought against magistrates for issuing a warrant of distress to enforce payment of a highway-rate, they will have no defence, should the rate prove invalid; for although the

[1] 1 B. & B. 442, cited by Lord Denman as an admirable judgment in R. v. Bolton, 1 Q. B. 74.

[2] 5 & 6 Will. 4, c. 50, § 73.

[3] Mould v. Williams, 5 Q. B. 469.

[4] Basten v. Carew, 3 B. & C. 649.

[5] Cave v. Mountain, 1 M. & Gr. 257, 262, cited with approbation in R. v. Bolton, 1 Q. B. 75; In re Clarke, 2 Q. B. 619; Anon., 1 B. & Ad. 382; R. v. Walker, 2 M. & Rob. 457, per Coltman, J.; Gray v. Cookson, 16 East, 13; R. v. Hickling, 7 Q. B. 880.

rate must be good in order to give them jurisdiction, they cannot judicially decide upon its validity, and the consequence is, that their warrant cannot be any evidence, still less conclusive evidence, of any fact on which the validity of the rate depends.[1] The same doctine applies to warrants of distress for borough rates issued by the mayor;[2] and it was also formerly applicable to all distress warrants, which had been granted by justices for the purpose of compelling the payment of a poor-rate. It is now, however, enacted by § 1 of the Act of 11 & 12 Vict., c. 44, "that, where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein."

§ 1486. In many cases a judgment is tendered in evidence, not merely to prove its existence and its legal consequences, or to protect the party who pronounced it against legal proceedings, but in order to *conclude an opponent* upon the *facts determined;* and for this purpose, the rules which govern the admissibility of the record will vary according to the nature of the judgment. Thus, if it be a *judgment in rem*, it will bind all persons whomsoever; and this too, perhaps, although it has not been pleaded;[3] but if it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto;[4] and even as against them, it will not, as it seems, be regarded as absolutely conclusive evidence, unless it be specially pleaded by way of estoppel.[5]

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[1] Mould *v.* Williams, 5 Q. B. 476, per Lord Denman; Weaver *v.* Price, 3 B. & Ad. 409; Morrell *v.* Martin, 3 M. & Gr. 593, per Tindal, C. J.; Lord Amherst *v.* Lord Somers, 2 T. R. 372; Nichols *v.* Walker, Cro. Car. 394.

[2] Fernley *v.* Worthington, 1 M. & Gr. 491. See Newbould *v.* Coltman, 6 Ex. R. 189.

[3] See 2 Smith's Lead. Cas. 448; Hannaford *v.* Hunn, 2 C. & P. 155, per Abbott, C. J.; Magrath *v.* Hardy, 4 Bing. N. C. 796, per Tindal, C. J.

[4] 2 Smith's Lead Cas. 439, 441.

[5] Ante, § 78; post, § 1497. In * America the weight of authority is in

* Gr. Ev. § 531, and note.

§ 1487. A *judgment in rem* has been *defined* by an able writer to be "an adjudication pronounced, as its name indeed denotes,

favour of the conclusiveness of a judgment, when given in evidence, although not pleaded by way of estoppel. Kilheffer *v.* Herr, 17 Serg. & R. 325, 326; Shafer *v.* Stonebraker, 4 Gill & J. 345; Cist *v.* Zeigler, 16 Serg. & R. 282; Betts *v.* Starr, 5 Conn. 550, 553; Preston *v.* Harvey, 2 H. & Mun. 55; Estill *v.* Taul, 2 Yerg. 467, 471; Lawrence *v.* Hunt, 10 Wend. 83, 84; Marsh *v.* Pier, 4 Rawle, 288, 289. In this last case the point was briefly but forcibly argued by Kennedy, J., in the following terms: "The propriety of those decisions, which have admitted a judgment in a former suit to be given in evidence to the jury, on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held that the jury were not absolutely bound by such judgment, because it was not pleaded, may well be questioned. The maxim, Nemo debet bis vexari, si constet curiæ quod sit pro unâ et eâdem causâ, being considered, as doubtless it was, established for the protection and benefit of the party, he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow, that wherever, on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, it ought to be considered conclusively binding on both Court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, Expedit reipublicæ ut sit finis litium, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the Court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness. The result, among other things, would be, that the tribunals of the state would be bound to give their time and attention to the trial of new actions for the same causes, tried once or oftener in former actions between the same parties or privies, without any limitation other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally, of other causes, which never have passed in rem judicatam. The effect of a judgment of a Court, having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may, or may not, be enforced at the election of the other party; because, whatever the parties have done by compact, they

upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose."[1] This definition is given as the best, if not the only intelligible one, to be found in the books; but still, too much reliance must not be placed upon it, as it would seem to include convictions on criminal prosecutions, adjudications on bankruptcy and insolvency, inquisitions in lunacy, inquisitions post mortem, and several other species of judicial decisions, which, if judgments in rem at all, are at least not governed by the same rules of evidence as are generally applicable to adjudications of that nature. For instance, the characteristic quality of a judgment in rem is, that it furnishes, in general, *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend, either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments inter partes;[2] or to adjudications of bankruptcy or insolvency, the admissibility and effect of which

may undo by the same means. But a judgment of a proper Court, being the sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards as long as it shall remain in force and unreversed." This decision has been given at length, out of respect for the able judge who pronounced it, but probably the reasoning will not be deemed satisfactory by the majority of lawyers. The peace of the community will be little liable to any serious disturbance from the litigious spirit of suitors, so long as one of the litigants has the power, by pleading, to estop his adversary from again controverting a question, which has once been solemnly decided; whereas, if judgments recovered were to have a conclusive operation without being pleaded, much useless expense might be incurred, and, consequently, much injustice might be perpetrated, especially in actions against privies; for such persons might not know that any judgment had been recovered against the party, through whom they claim, and might therefore, seeing no intimation of the existence of such judgment on the record, go down to trial, and then, having been taken entirely by surprise and defeated, be compelled to pay a large bill for their own costs, and a larger one for those of their adversary.

[1] 2 Smith's Lead. Cas. 439.

[2] R. *v.* Turner, 1 Moo. C. C. 347; 1 Lew. C. C. 119, S. C.; R. *v.* Ratcliffe, 1 Lew. C. C. 122; R. *v.* Blakemore, 2 Den. 410; Keable *v.* Payne, 8 A. & E. 560; Blakemore *v.* Glamorganshire Can. Co., 2 C. M. & R. 139, per Parke, B., explaining Smith *v.* Rummens, 1 Camp. 9; and Hathaway *v.* Barrow, id. 151. Post, § 1505.

depend in great measure upon the statute law;[1] or to inquisitions in lunacy, inquisitions post mortem, or other inquisitions, which though regarded as judgments in rem, so far as to be admissible evidence of the facts determined against all mankind, are, for some unexplained reason, considered as not conclusive evidence.[2] Thus, it has been repeatedly ruled, that an inquisition in lunacy,[3] though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry;[4] and the same rule has been applied to most other inquisitions.[5]

§ 1488. Though, for the reasons just given, Mr. Smith's definition of a judgment in rem cannot be regarded as perfect, yet it would be extremely difficult, if not impossible, to enunciate any other, which would be open to fewer objections. Without, therefore, attempting a task, which a long series of unsystematic decisions would render hopeless, it may be deemed sufficient for all practical purposes, to furnish a tolerably correct *list* of those adjudications which are unquestionably regarded as *judgments in rem*. This list will be found to contain judgments of condem-

[1] See post, §§ 1556—1559.

[2] The Irish Society *v.* Bp. of Derry, 12 Cl. & Fin. 666.

[3] See 5 & 6 Vict., c. 84; 8 & 9 Vict., c. 100, § 2; and 16 & 17 Vict., c. 70, § 38, et seq.

[4] Faulder *v.* Silk, 3 Camp. 126, per Lord Ellenborough; Dane *v.* Kirkwall, 8 C. & P. 683, per Patteson, J.; Frank *v.* Frank, 2 M. & Rob. 315, 316, n.; Sargeson *v.* Sealy, 2 Atk. 412; Bannatyne *v.* Bannatyne, 2 Roberts. Ec. R. 475—477; Hume *v.* Burton, 1 Ridg. App. Cas. 204; Den *v.* Clark, 5 Halst. 217; Hart *v.* Deamer, 6 Wend. 497.

[5] Stokes *v.* Dawes, 4 Mason, 268, per Story, J. In Jones *v.* White, 1 Stra. 68, the Court was divided upon the question, whether a coroner's inquest, finding a person who had destroyed himself lunatic, was admissible at all as evidence of his insanity on an issue on that fact. An inquisition by a sheriff's jury, taken prior to the Interpleader Act, 1 & 2 Will. 4, c. 58, for the purpose of ascertaining to whom goods seized under a fi. fa. belonged, has been held to be wholly inadmissible, as not being an inquisition under the Queen's writ, but merely a proceeding by the sheriff of his own authority. Glossop *v.* Pole, 3 M. & Sel. 175; Latkow *v.* Eamer, 2 H. Bl. 437. See Chapman *v.* Monmouthshire Rail. & Can. Co., 2 H. & N. 267; and R. *v.* London & North-West. Rail. Co. 3 E. & B. 443, as to the effect of an inquisition before a sheriff's jury under § 68 of the Lands Clauses Consol. Act, 1845, 8 & 9 Vict., c. 18.

nation of property as forfeited, whether pronounced by the Court of Exchequer,[1] or by the commissioners or sub-commissioners of excise, inland revenue,[2] or customs;[3]—adjudications in the Court of Admiralty on the subject of prize;[4]—sentences of divorce a mensa et thoro[5] under the old law, and of judicial separation, under the existing law;[6]—decrees dissolving marriage;[7] decrees in other matrimonial suits,[8] but not in suits for jactitation of marriage, unless, *perhaps*, in cases where the defendant pleads a marriage, and the Court decides on the truth of that plea;[9]—grants of probate[10]—and administration;[11]—sentences of deprivation and expulsion, whether delivered by the Spiritual Court, a visitor, or a college;[12]—judgments of outlawry;[13]—adjudications of settlement by an order of justices, whether unappealed against,[14]

[1] Geyer v. Aquilar, 7 T. R. 696, per Lord Kenyon; Scott v. Shearman, 2 W. Bl. 977; Cooke v. Sholl, 5 T. R. 255.

[2] 12 & 13 Vict., c. 1, § 3.

[3] Maingay v. Gahan, Ridg. Lapp. & Sch. R. 1, 79; 1 Ridg. App. Cas. 43, 44, n., S. C. There the Irish Exchequer Chamber expressly overruled Henshaw v. Pleasance, 2 W. Bl. 1174, a decision which, according to Fitzgibbon, Ch., see R. L. & S. 79, was reprobated by Lord Mansfield in Dixon v. Cock, and was frequently condemned by Lord Lifford, Ch. See also Roberts v. Fortune, 1 Hargr. L. Tracts, 468, n., per Lee, C. J.; Terry v. Huntington, Hardr. 480; and Fuller v. Fotch, Carth. 346, all which cases are also at variance with Henshaw v. Pleasance.

[4] Le Caux v. Eden, 2 Doug. 612, per Buller, J.; Lindo v. Rodney, id. 614, per Lord Mansfield. For other proceedings in rem in the Court of Admiralty, see Harmer v. Bell, 7 Moo. P. C. R. 267.

[5] R. v. Grundon, 1 Cowp. 322, per Lord Mansfield; Day v. Spread, Jebb & Bourke, 163.

[6] 20 & 21 Vict., c. 85, §§ 7 & 16.

[7] Id. §§ 27 & 31.

[8] Da Costa v. Villa Real, 2 Str. 961; Bunting's case, 4 Co. 29; Kenn's case, 7 Co. 42; Perry v. Meddowcroft, 10 Beav. 122; Harrison v. Corp. of Southampton, 22 L. J., Ch., 372. But see Goodin v. Smith, Milw. Eccl. Ir. R. temp. Radcliffe, 243—245.

[9] R. v. Duchess of Kingston, 20 How. St. Tr. 543; 2 Smith's Lead. Cas. 424, 431, 446, S. C.

[10] Noel v. Wells, 1 Lev. 235, 236; Allen v. Dundas, 3 T. R. 125.

[11] Bouchier v. Taylor, 4 Bro. P. C. 708. See Prosser v. Wagner, 1 Com. B., N. S. 289.

[12] Phillips v. Bury, 2 T. R. 346, per Lord Holt; R. v. Grundon, 1 Cowp. 315, 321, 322, per Lord Mansfield.

[13] 2 Co. Lit. 352, b.

[14] R. v. Kenilworth, 2 T. R. 599, per Buller, J.

or confirmed by a Court of Quarter Sessions on appeal;[1]—orders of justices for dividing roads under the Act of 34 Geo. 3, c. 64;[2] —and perhaps sentences of courts-martial.[3]

§ 1489. These judgments so far furnish conclusive evidence of the points they decide, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown, either that the Court had no jurisdiction,[4] or that the judgment was obtained by fraud or collusion,[5] no evidence can be admitted, at least in any civil cause,[6] for the purpose of disproving the facts adjudicated. This rule appears to rest, partly upon the ground, that in most of the above cases every one who can possibly be affected by the decision is entitled, if he think fit, to appear and assert his own rights, by becoming an actual party to the proceedings;[7] partly, upon the ground, that judgments *in rem* not merely declare the *status* of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be,[8] and partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful; but, that after having been clearly defined by one solemn adjudication, they should conclusively be set at rest.

§ 1490. Though a judgment in rem is thus binding upon all the world as to the precise point directly decided, and consequently the decision cannot be impeached in the same or another court, by

[1] R. *v.* Wick St. Lawrence, 5 B. & Ad. 533, per Lord Denman.

[2] R. *v.* Hickling, 7 Q. B. 880.

[3] 2 Smith's Lead. Cas. 447. See R. *v.* Suddis, 1 East, 306; Hannaford *v.* Hunn, 2 C. & P. 148; Grant *v.* Gould, 2 H. Bl. 100.

[4] Post, § 1523, et seq.

[5] R. *v.* Duchess of Kingston, 20 How. St. Tr. 544; 2 Smith's Lead. Cas. 431, 432, S. C. See post, § 1522.

[6] As to effect of judgments in rem in criminal trials, see post, § 1493.

[7] 1 St. Ev. 286. This is not an essential foundation for the rule, as it has been held that a sentence of nullity of marriage will be binding upon, and have the effect of bastardising, a child of the parties, who at the time when the sentence was pronounced was en ventre sa mère. Perry *v.* Meddowcroft, 10 Beav. 122.

[8] 2 Smith's Lead. Cas. 439, 440.

showing that the facts on which it immediately rests are false;—yet, where these facts are themselves put directly in issue in a subsequent suit, the judgment does not, with one exception which will be presently mentioned,[1] furnish conclusive evidence of their truth, however necessary it may have been for the Court proceeding in rem to have determined that question before it adjudicated upon the principal point.[2] Thus, although the Ecclesiastical Courts *were* not, and the existing Courts of Probate *are* not, authorised to grant letters of administration, unless the intestate be *dead*, these letters are so far from being conclusive evidence of the death, when that fact is put in issue in another court, that on one or two occasions they have not been regarded even as primâ facie proof.[3] However, in a late case, where the question was whether a child had been born alive or dead, Lord Chancellor Sugden held, that a grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive.[4] Again, though a probate cannot be granted until the Court of Probate is satisfied of the genuineness of the will, and though, when granted, the title of the executor cannot be impeached in a court of law by showing that the will was forged,[5] still, if a party be indicted for forging the will, the probate will not be conclusive, if indeed it be primâ facie evidence in favour of the defendant.[6] Neither would the production of a probate preclude a party from showing in a common-law court, that the testator was insane at the time when he executed the will, provided the object of this evidence were not to impeach the title of the executor, in which case it would be inadmissible.[7]

§ 1491. An exception to the above rule is recognised in cases,

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[1] Post, § 1491.

[2] See Bailey *v.* Harris, 12 Q. B. 905.

[3] Thompson *v.* Donaldson, 3 Esp. 63; Moons *v.* De Bernales, 1 Russ. 301; French *v.* French, 1 Dick. 268.

[4] Reilly *v.* Fitzgerald, 6 Ir. Eq. R. 349.

[5] Noel *v.* Wells, 1 Lev. 235, 236.

[6] R. *v.* Buttery, R. & R. 342; R. *v.* Gibson, id. 343 n., per Lord Ellenborough, overruling R. *v.* Vincent, 1 Stra. 481.

[7] Marriot *v.* Marriot, 1 Stra. 671.

where it appears on the face of the proceedings *in rem* that the fact on which the principal point depended, was itself put *directly in issue*, and was *actually decided* by the Court. Here, if this fact be again controverted between the *same parties*, or persons claiming under them, whether in the same or in a different court, the judgment in rem will be conclusive upon the question. For instance, if, in a suit for administration, the sole question be, which of two parties is next of kin to the intestate, the sentence of the Court of Probate, declaring, "that, as far as appears by the evidence, the defendant has proved himself next of kin," and that administration be granted to him as such, will be conclusive evidence of the relative relationship of the parties in a subsequent suit between them for distribution, instituted in the Court of Chancery.[1] The judgment in such a case would be equally conclusive on the parties, if the question of kindred had been determined by the Court, not as a matter of fact, but as a point of law.[2] So, where on appeal against an order of justices removing three paupers as the children of A. and B., the respondents relied upon a confirmed order for the removal of "A. and *his wife* B." from the respondent to the appellant parish, it was held that the appellants were conclusively estopped by this order, from showing that the children were illegitimate, in consequence of A. having committed bigamy in marrying B.[3] Indeed, it has been laid down broadly, with respect to orders of removal unappealed against, or confirmed on appeal, that they are not only evidence, but conclusive, as to all the *facts mentioned* in them, and which are *necessary steps* to the decision.[4]

§ 1492. In the case of R. *v.* Wye,[5] a curious question arose, in consequence of two *conflicting judgments in rem* having been pronounced. A pauper and his wife and their six children were

[1] Barrs *v.* Jackson, 1 Phill. Ch. R. 582, 587, 588, per Lord Lyndhurst; Bouchier *v.* Taylor, 4 Brown, P. C. 708; Harg. Law Tracts, 473, S. C.

[2] Thomas *v.* Ketteriche, 1 Ves. Sen. 333, per Lord Hardwicke, recognised by Lord Lyndhurst in Barrs *v.* Jackson, 1 Phill. Ch. R. 587.

[3] R. *v.* Woodchester, Burr. S. C. 191; 2 Stra. 1172, S. C.; R. *v.* St. Mary, Lambeth, 6 T. R. 615.

[4] R. *v.* Wye, 7 A. & E. 770, per Lord Denman; R. *v.* Hartington Middle Quarter, 4 E. & B. 780.

[5] 7 A. & E. 761.

removed by an order of justices, which was confirmed on appeal. Subsequently, the Spiritual Court declared the marriage of these paupers void, on the ground of being incestuous.[1] One of the children, born before the date of the order, but not named in it, was afterwards removed to the appellant parish, as the place of his father's settlement. The parish appealed, and relied on the decree of the Ecclesiastical Court; but the respondents urged, on the authority of R. *v.* Woodchester,[2] that the former order for removing the parents as man and wife was conclusive evidence of the legitimacy of the present pauper. A case being reserved for the opinion of the Queen's Bench, that Court decided in favour of the appellants, upon the ground that a *new state of facts* had arisen since the former order, the marriage, which at that time was only voidable, having since been declared void by competent authority.

§ 1493. Whether a judgment in rem is conclusive in a *criminal* proceeding is a question which admits of some doubt. In the Duchess of Kingston's case, the judges expressed a decided opinion in the negative, urging first, that it would be contrary to public policy, that the temporal courts, in the investigation of a criminal charge, should be bound by a decision perhaps of an ecclesiastical judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favour of a prisoner, it would be equally binding against him; and consequently his life, liberty, property, and fame might depend upon the judgment of a court, which had no organs to discover whether he had committed a crime or not.[3] On the other hand, it has been contended, that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, it being merely an obiter dictum unnecessary for the decision of the points submitted to them;[4] and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous

[1] See now 5 & 6 Will. 4, c. 54.
[2] Burr. S. C. 191; 2 Stra. 1172, S. C.
[3] 20 How. St. Tr. 540—543; 2 Smith's Lead. Cas. 428—430, S. C.
[4] 2 Smith's Lead. Cas. 446, 447.

than a conflict of decisions between different courts; and that if judgments in rem are not regarded as binding upon all courts alike, the most startling anomalies may occur.

§ 1494. The authorities reported in the books throw little light upon the subject. R. *v.* Buttery[1] is sometimes cited as confirming the opinion of the judges in the Duchess of Kingston's case, but in fact it lends little if any support to that opinion; for the only point there determined was, that, if a party be indicted for forging a will, the mere production of the probate is not conclusive evidence of its validity; a doctrine which is unquestionably sound law, but which, as before stated,[2] would apply equally to a civil action, provided the object was not to dispute the title of the executor. On the other hand, where the inhabitants of a parish were indicted for not repairing a road, and an order of justices for dividing the road was put in on behalf of the prosecution, the Court held, that, as this order pursued the form given by the Act of 34 Geo. 3, c. 64, it was conclusive of the liability of the defendants to repair the portion of the road allotted to them, and they were consequently not allowed to prove that, in fact, no part of the road ever was within their parish.[3] This case, however, is one of little authority on the present question, since it was determined, without any reference to the fact of its being an indictment, as coming within the principle of Brittain *v.* Kinnaird.[4] It may be added, that in R. *v.* Grundon,[5] which was an indictment for an assault upon an undergraduate of Queen's College, Cambridge, in turning him out of the college garden, the production of a sentence of expulsion was held to constitute a conclusive defence.

§ 1495. Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not, with one exception, admissible either for or against *strangers* in proof of the facts adjudicated. They are not admissible against them, because it is an obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of

[1] R. & R. 342, cited ante, § 1490.
[2] Ante, § 1490.
[3] R. *v.* Hickling, 7 Q. B. 880.
[4] 1 B. & B. 432.
[5] 1 Cowp. 315.

which he could, therefore, have exercised no control; or, to express the same sentiment in technical language, *res inter alios actæ alteri nocere non debent;*[1] and they cannot be received in their favour even as against a party thereto, because it is thought, with very questionable propriety, that the previous rule might work injustice, unless its operation were *mutual.*[2]

§ 1496. The *exception* just stated is allowed in favour of verdicts, judgments, and other adjudications upon subjects of a *public nature,* such as customs,[3] prescriptions,[4] tolls,[5] boundaries between parishes, counties, or manors,[6] rights of ferry,[7] liabilities to repair roads[8] or sea-walls,[9] modusses,[10] and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications, which for this purpose are regarded as a species of reputation, will also be received, and this too, whether the parties in the second suit be those who litigated the first, or be utter strangers.[11] The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive.[12]

§ 1497. Though a judgment inter partes is thus seldom admissible, and never conclusive evidence of the facts adjudicated, either for or against strangers, it is always admissible for or

[1] B. N. P. 232.

[2] Smith v. Rummens, 1 Camp. 9; Hathaway v. Barrow, id. 151; Blakemore v. Glamorganshire Can. Co., 2 C. M. & R. 139, per Parke, B.; Co. Lit. 352 a, cited and approved of in Gaunt v. Wainman, 3 Bing. N. C. 70, per Tindal, C. J.; and in Doe v. Errington, 6 Bing. N. C. 83, per id., ante, § 86. See also Greely v. Smith, 1 Woodb. & Min. 181.

[3] Reed v. Jackson, 1 East, 357, per Lord Kenyon; Berry v. Banner, Pea. R. 156.

[4] Id.

[5] B. N. P. 233.

[6] Brisco v. Lomax, 8 A. & E. 198; Evans v. Rees, 10 A. & E. 151, 153.

[7] Pim v. Curell, 6 M. & W. 234; Hemphill v. M'Kenna, 8 Ir. Law R. 43.

[8] R. v. St. Pancras, Pea. R. 220; R. v. Haughton, 1 E. & B. 501.

[9] R. v. Leigh, 10 A. & E. 398.

[10] Croughton v. Blake, 12 M. & W. 205, 209.

[11] Cases cited in last eight notes; ante, §§ 559—562.

[12] Reed v. Jackson, 1 East, 357; Croughton v. Blake, 12 M. & W. 205.

against *parties* or *privies*, where the same subject-matter is a second time in controversy between the same persons or parties claiming under them.[1] Probably, indeed, it will not be regarded as quite conclusive of the rights in dispute, unless it be pleaded as matter of estoppel;[2] but certainly it will furnish highly cogent evidence, which cannot be disregarded by a jury, excepting upon good and substantial grounds.[3] The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.

§ 1498. Under the term *parties* in this connexion, the law includes *all* those who are *individually named in the record*, and who are consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law.[4] Even a party who had been sued as the public officer of a bank, has been held in Ireland to be amenable to this rule, though it was urged in his favour that the judgment relied on had been obtained against him en autre droit.[5] However, a prochein amy is not such a party, being considered simply as a person appointed by the Court to look after the interests of the infant, and to manage the suit for him;[6] but the infant himself is a party, and will, consequently, be bound by the judgment in any action brought in his name by his prochein amy duly appointed, even though the suit may have been instituted and conducted without his authority or knowledge.[7] Neither will the law, in such a case, recognise any distinction between infants of

[1] Duchess of Kingston's case, 20 How. St. Tr. 538; B. N. P. 232; Ferrers *v.* Arden, 6 Rep. 7; Cro. Eliz. 668, S. C.

[2] Ante, §§ 78, 1486; Joly *v.* Swift, 11 Ir. Eq. R. 410; Nowlan *v.* Gibson, 12 Ir. Law R. 5, 8—12, per Pigot, C. B.

[3] Outram *v.* Morewood, 3 East, 365, per Lord Ellenborough; R. *v.* Blakemore, 2 Den. 410.

[4] Duchess of Kingston's case, 20 How. St. Tr. 538, n.; 2 Smith's Lead. Cas. 425, S. C.

[5] Spencer *v.* Thompson, 6 Ir. L. R., N. S., 537, 566.

[6] Sinclair *v.* Sinclair, 13 M. & W. 640.

[7] Morgan *v.* Thorne, 7 M. & W. 400.

tender and of mature years; and therefore, where the wife of a minor committed adultery, whilst her husband was abroad in the East Indies, and the father, having procured himself to be appointed prochein amy, commenced an action for criminal conversation in his son's name, but without his knowledge, the Court held that the son would be bound by the judgment in this action.[1] But if a person *sui juris* be made a party to a suit without his knowledge or consent, he will not be bound by the proceedings; and therefore, if a plaintiff, instead of serving a defendant with process, thinks fit to accept the appearance of an unauthorised attorney for him, he runs the risk of having the judgment subsequently set aside as irregular, with costs.[2] So, where a debtor, on action brought, paid his debt to the attorney who was suing him in the name, but without the authority, of the creditor, it was held that this payment did not discharge him.[3] In such a case as the last, the defendant should apply to the Court, who will stay the proceedings, and compel the attorney to pay the costs incurred in the defence.[4]

§ 1499. Whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended,* may admit of some doubt. The case of Kinnersley *v.* Orpe[5] is said to have decided this point in the affirmative;[6] but this, it is submitted, is a mistake. That was an action brought to recover penalties from a servant of one Cotton for fishing in the plaintiff's fishery. The plaintiff, in support of his right to the fishery, produced no other proof than the record of a verdict and judgment recovered by him against another servant of Cotton, in a former action for a trespass committed in the same fishery. In both actions the servants justified as acting by the orders of their master, who claimed a right to the fishery in question.

[1] Morgan *v.* Thorne, 7 M. & W. 400.
[2] Bayley *v.* Buckland, 1 Ex. R. 1. [3] Robson *v.* Eaton, 1 T. R. 62.
[4] Hubbart *v.* Phillips, 13 M. & W. 702. [5] 2 Doug. 517.
[6] Thus, in Simpson *v.* Pickering, 1 C. M. & R. 529, Alderson, B., observes, as an obiter dictum, "Kinnersley *v.* Orpe shows that the verdict may be given in evidence, where the parties are *really* the same." See also 2 Ph. Ev. 7; and Doe *v.* E. of Derby, 1 A. & E. 791, per Littledale, J.

The judge at Nisi Prius, considering Cotton as the real defendant in both actions, held the record to be conclusive, and directed the jury to find for the plaintiff, which they did. A new trial was, however, subsequently granted, the Court intimating that the record, though admissible evidence, was not conclusive. As no reasons are given for this opinion, the case would be one of little authority, even had it never been questioned; but its value becomes much less, when we find Lord Ellenborough, in his well-considered judgment in Outram *v.* Morewood,[1] expressing his astonishment that an estoppel in such a case could ever have been supposed possible; and then, in the shape of a doubt, intimating a tolerably clear opinion that the record was wholly inadmissible, as the defendant was no party to the former action.

§ 1500. However, thus much has been established, that, under the old law relative to actions of ejectment, the lessor of the plaintiff and the tenant in possession must be regarded as the real parties; and consequently, any judgment in such an action, whether upon verdict, or by default against the casual ejector, is cogent, if not conclusive, evidence in any subsequent action between the same parties respecting the same property, whether in ejectment or for mesne profits.[2] So, the landlord, or other person, in whose right a defendant in replevin has made cognizance, has been held to be a party to that suit;[3] and it would certainly be convenient and reasonable if the rule, in conformity with that which governs admissions,[4] were extended to all persons who were *substantially* parties to the former action. Indeed, it is highly probable, notwithstanding the absence of direct authority, that the Courts would now determine in favour of such extension, and the more so, as beyond all doubt, the rule applies to every

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[1] 3 East, 366. See Case *v.* Reeve, 14 Johns. 81, 82.

[2] Doe *v.* Huddart, 2 C. M. & R. 316; 5 Tyr. 846, S. C.; Doe *v.* Seaton, 2 C. M. & R. 728, 732; Wright *v.* Doe d. Tatham, 1 A. & E. 19; B. N. P. 232; Doe *v.* Wellsman, 2 Ex. R. 368; 6 Dowl. & L. 179, S. C.; Armstrong *v.* Norton, 2 Ir. Law. R. 96; Aslin *v.* Parkin, 2 Burr. 665; Nowlan *v.* Gibson, 12 Ir. Law R. 5, 10—14; Litchfield *v.* Ready, 5 Ex. R. 939; Matthew *v.* Osborne, 13 Com. B. 919; Doe *v.* Challis, 17 Q. B. 166. See post, § 1508.

[3] Hancock *v.* Welsh, 1 Stark. R. 347.

[4] Ante, § 686.

person who claims under the original parties, or in privity with them.

§ 1501.[1] It has already been shown, that the term *privity* denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to the litigant can rely upon, and are bound by, the proceedings to which he has been a party, is, that they are identified with him in interest.[2] Hence all privies, whether in blood, in estate, or in law, are estopped themselves, and can estop others, from litigating that, which would be conclusive either against or in favour of him, with whom they are in privity.[3] Thus, a verdict and judgment for or against the ancestor may be pleaded in bar, or will furnish cogent evidence, for or against the heir, the tenant in dower, the tenant by the curtesy, the legatee, the devisee, or any other person claiming under the ancestor.[4] So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession.[5] A judgment of ouster in a quo warranto, against the incumbent of an office, is conclusive against those who derive their title to office under him.[6] The conviction, too, of a former owner of lands on an indictment for non-repair of a road ratione tenuræ, will be cogent, if not conclusive, evidence, of liability to repair as against a subsequent purchaser of the same lands.[7] So, an executor or administrator will be bound by a verdict recovered against the testator or intestate;[8] a husband and wife will be bound by a verdict recovered against the wife before her marriage;[9] and the same rule will apply to all grantees, mortgagees, and assignees, provided their title has accrued *since* the judgment was pronounced.[10]

[1] Gr. Ev., in part, as to first eight lines.
[2] Ante, §§ 77, 712. [3] Ante, § 77.
[4] Lock *v.* Norborne, 3 Mod. 141; Outram *v.* Morewood, 3 East, 346.
[5] Pyke *v.* Crouch, 1 Lord Raym. 730; B. N. P. 232; Doe *v.* Tyler, 6 Bing. 390.
[6] R. *v.* Mayor of York, 5 T. R. 66, 72, 76; R. *v.* Hebden, 2 Selw. N. P. 1180, 1181; 2 Stra. 1109, S. C. [7] R. *v.* Blakemore, 2 Den. 410.
[8] R. *v.* Hebden, Andr. 389. [9] Outram *v.* Morewood, 3 East, 346.
[10] Doe *v.* E. of Derby, 1 A. & E. 790, per Littledale, J.; Doe *v.* Webber, 1 A. & E. 119; Adams *v.* Barnes, 17 Mass. 365.

§ 1502. Where a man brought an action against several persons for diverting water from his works, and had judgment; and afterwards he and another sued the same defendants for a similar injury to the same works; the former judgment was held to be cogent evidence for the plaintiffs, their privity in estate with the former plaintiff being presumed by the Court from the fact that they were in possession of the property.[1] In that case,—which was decided before parties to the record were rendered competent to testify,—it was objected to the admissibility of the judgment, that one of the plaintiffs had himself been a witness for the other in the former suit, when he was disinterested; but the Court overruled the objection, giving the following sensible reason for their decision:—"The case being brought within the general rule, that a verdict on the matter in issue is evidence for or against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it, which forms one of the reasons why verdicts between different parties are held to be inadmissible; any more than the absence of all such circumstances in a particular case, would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received. It is much wiser and more convenient for the administration of justice, to abide as much as possible by general rules."[2]

§ 1503. In all the instances of privity above given, the privy has claimed, or been liable, *under or through* the original party; but the same rules of law apply, where two or more persons are subject to a *joint* or *concurrent* liability. For instance, if one be sued alone upon a *joint* note, debt, or tort, and he waive his plea in abatement, the judgment against him, even *without satisfaction*, may be pleaded and proved in bar of a second suit for the same cause of action, whether it be brought against the other debtor or wrong-doer, or against the joint debtors or wrong-doers; because in these cases, the original cause of action has been changed into matter of record, which is of a higher nature, and the inferior

[1] Blakemore *v.* Glamorganshire Can. Co., 2 C. M. & R. 133, 139; Strutt *v.* Bovingdon, 5 Esp. 58, 59, per Lord Ellenborough.

[2] 2 C. M. & R. 139, per Parke, B.

remedy is thus merged in the higher.[1] So, where a party having concurrent, that is, joint and several remedies against several persons, has obtained judgment against one, he will certainly be estopped from proceeding against the others, if the damages have been received; and he will probably be estopped, even though the judgment has not been satisfied;[2] for if the law were otherwise, a plaintiff might recover damages twice over for the same cause of action, which would be repugnant to natural justice.[3] So, if an action on a joint contract or trespass be brought against two defendants, it seems that one of them may plead in abatement the pendency of another action against him for the same cause;[4] but if A. be sued on a contract, the pendency of an action against B. for the same cause cannot be pleaded in abatement, for in such case A. is not twice vexed; and his proper course, therefore, is either to plead the non-joinder of B., if B. is within the jurisdiction, or to appeal to the equitable authority of the Court for a stay of proceedings.[5]

§ 1504. Upon a somewhat similar principle, if a judgment has been recovered, and execution executed, against a garnishee in a suit of *foreign attachment*, he may rely on these facts as an

[1] King *v.* Hoare, 13 M. & W. 494, 504; 2 Dowl. & L. 382, S. C.; Lechmere *v.* Fletcher, 1 Cr. & Mee. 634, per Bayley, B.; Brown *v.* Wootton, Yelv. 67; Cro. Jac. 73; Moor, 762, S. C.; Ward *v.* Johnson, 13 Mass. 148. These cases overrule a dictum of Lord Tenterden in Watters *v.* Smith, 2 B. & Ad. 892, and Sheehy *v.* Mandeville, 6 Cranch, 253, 265.

[2] Buckland *v.* Johnson, 15 Com. B. 145.

[3] Bird *v.* Randall, 3 Burr. 1345, 1353; 1 W. Bl. 373, 387, S. C.; recognised in Cooper *v.* Shepherd, 3 Com. B. 272; King *v.* Hoare, 13 M. & W. 496, 505, per Parke, B.; Lechmere *v.* Fletcher, 1 Cr. & Mee. 623, 634, 635, per Bayley, B.; U. S. *v.* Cushman, 2 Sumn. R. 426, 437—441, per Story, J.; Farwell *v.* Hilliard, 3 N. Hamp. 318. See Godson *v.* Smith, 2 Moore, 157.

[4] E. of Bedford *v.* Bp. of Exeter, Hob. 137; Rawlinson *v.* Oriel, 1 Show. 75; Carth. 96; Henry *v.* Goldney, 15 M. & W. 499, per Alderson, B.

[5] Henry *v.* Goldney, 15 M. & W. 494, overruling a dictum of Lord Ellenborough in Boyce *v.* Douglas, 1 Camp. 60. See Newton *v.* Blunt, 3 Com. B. 675, where two actions having been brought against two joint-contractors in respect of the same demand, and the debt and costs in one action having been paid, held that a judge at Chambers might stay the proceedings in the other action without costs.

estoppel, should any subsequent action be brought against him by the defendant in such suit, for the moneys paid by him to the defendant's creditor under the process of the Tolzee or Mayor's Court;[1] and this, too, whether the debt sued for in such Court accrued within its jurisdiction or not.[2] So any payment made by, or execution levied upon, a garnishee under any proceeding for the attachment of debts owing or accruing from him to a judgment debtor, is rendered, by the Common Law Procedure Act of 1854, a valid discharge to the garnishee as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.[3]

§ 1505. In conformity with the rule, which rejects judgments inter partes as evidence either for or against *strangers* to prove the facts adjudicated, it has been determined that a judgment in a criminal prosecution,—unless admissible as evidence in the nature of reputation,[4]—cannot be received in a civil action, to establish the truth of the facts, on which it was rendered;[5] and that a judgment in a civil action, or an award,[6] cannot be given in evidence for such a purpose in a criminal prosecution.[7] So, the record of the conviction of a principal cannot be received as any

[1] Magrath *v.* Hardy, 4 Bing. N. C. 782; Webb *v.* Hurrell, 4 Com. B. 287; Huxham *v.* Smith, 2 Camp. 19, per Lord Ellenborough; Crosby *v.* Hetherington, 4 M. & Gr. 933; M'Daniel *v.* Hughes, 3 East. 367; Philips *v.* Hunter, 2 H. Bl. 402, 410; Hull *v.* Blake, 13 Mass. 153; Holmes *v.* Remsen, 20 Johns. 229. [2] Westoby *v.* Day, 2 E. & B. 605.

[3] 17 & 18 Vict., c. 125, §§ 60—67, and especially § 65. See also 19 & 20 Vict., c. 102, §§ 63—69, for corresponding clauses relative to Ireland.

[4] See Petrie *v.* Nuttall, 11 Ex. R. 569; ante, § 559.

[5] Smith *v.* Rummens, 1 Camp. 9; Hathaway *v.* Barrow, id. 151; both which cases are explained by Parke, B., in 2 C. M. & R. 139; Justice *v.* Gosling, 12 Com. B. 39; Jones *v.* White, 1 Stra. 68, per Eyre and Pratt, Js.; B. N. P. 233; Hillyard *v.* Grantham, cited by Lord Hardwicke in Brownsword *v.* Edwards, 2 Ves. Sen. 246; Gibson *v.* M'Carty, Cas. temp. Hardw. 311; Helsham *v.* Blackwood, 11 Com. B. 111; Wilkinson *v.* Gordon, 2 Add. 152, per Sir Jn. Nicholl; Jameson *v.* Leitch, Milw. Eccl. Ir. R. temp. Radcliffe, 690. The Fraudulent Trustee Act of 1857, 20 & 21 Vict., c. 54, expressly enacts, in § 12, that "no conviction of any offender against that Act shall be received in evidence in any action at law or suit in equity against him." [6] R. *v.* Fontaine Moreau, 11 Q. B. 1028.

[7] See R. *v.* Duchess of Kingston, 20 How. St. Tr. 471, 485; Acta facta in causâ civili non probant in causâ criminali. Masc. de Prob. Concl. 34

proof of his guilt on the trial of a subsequent indictment against the accessory.[1] However, where a prisoner was indicted for the substantive offence of receiving stolen goods, and a witness for the Crown, after confessing that he was himself the thief, admitted on cross-examination, that he had been tried and acquitted of the theft, the Irish judges held, that the acquittal of the principal, though not conclusive evidence of his innocence, was a fact which it was right to leave to the jury, together with the fact of his subsequent confession in court.[2] Again, a verdict for or against a tenant for life, will not be evidence for or against the reversioner, because the reversioner does not claim through the tenant for life, but enjoys an independent title.[3] So, a judgment obtained by or against a lessee, cannot, it is submitted,—notwithstanding some authorities to the contrary,[4]—be made available in a subsequent action by or against the lessor.[5]

§ 1506.[6] It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a *solemn admission* by such party in a judicial proceeding, with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs.[7] Thus, where a carrier brought trover against a person to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for

[1] R. *v.* Turner, 1 Moo. C. C. 347; 1 Lew. C. C. 119, S. C.; R. *v.* Ratcliffe, 1 Lew. C. C. 122, per Parke, J.; Keable *v.* Payne, 8 A. & E. 560, per Patteson, J.; R. *v.* Smith, 1 Lea. C. C. 288. These cases do not directly establish the proposition in the text; but its soundness is clear on principle, unless a conviction be a judgment in rem, which it is submitted it is not.

[2] R. *v.* M'Cue, 1 Jebb, C. C. 120.

[3] B. N. P. 232. See ante, § 687.

[4] Com. Dig. Ev. A. 5; 2 Ph. Ev. 11. The passage in Comyn seems to apply to the old action of ejectione firmæ.

[5] Wenman *v.* Mackenzie, 5 E. & B. 447; Rees *v.* Walters, 3 M. & W. 527; Rushworth *v.* Countess of Pembroke, Hardr. 472. See ante, § 714.

[6] Gr. Ev., § 527 a, in part.

[7] Ante, §§ 700, 708, 744.

the owner, in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had had the plaintiff's goods.[1] So, a record of judgment in a criminal case, upon a *plea of guilty*, is admissible in a civil action against the party, as a solemn judicial confession of the fact.[2]

§ 1507. In order that a judgment should bind parties and privies, it must have *directly decided the point* which is *in issue* in the *second suit;*[3] and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the opposite party is always at liberty to deny on the record, or at the trial, that it has settled the rights of the parties as to the same cause of action, which is now in controversy; and the question of identity thus raised, must be determined by the jury upon the evidence adduced. The due determination of this question will require a careful examination of the issues raised in the two actions; for while, on the one hand, it is not necessary that the actions should be in the same *form*, provided the facts in issue are really the same; so, on the other, it is not sufficient that the *writs* should be *identical*, if the issues raised by the pleadings are different.

§ 1508.[4] For instance, if one wrongfully take another's horse and sell him, applying the money to his own use, a recovery in trespass, in an action by the owner for the taking, would be a bar to a subsequent action of assumpsit for the money received, or for the price, the cause of action being proved to be the same.[5] So, if two wrongdoers were jointly to convert goods to their own use by selling

[1] Tiley *v.* Cowling, 1 Lord Raym. 744, per Holt, C. J.; B. N. P. 243, S. C.; Robison *v.* Swett, 3 Greenl. 316.

[2] Anon., per Wood, B., cited 2 Ph. Ev. 25; R. *v.* Fontaine Moreau, 11 Q. B. 1033, per Lord Denman; Bradley *v.* Bradley, 2 Fairf. 367.

[3] Ricardo *v.* Garcias, 12 Cl. & Fin. 368; Bainbrigge *v.* Baddeley, 2 Phill. 705, 709, 710; Toulmin *v.* Copland, id. 711.

[4] Gr. Ev., § 532, as to first five lines.

[5] 17 Pick. 13, per Putnam, J.; Young *v.* Black, 7 Cranch, 565; Livermore *v.* Herschell, 3 Pick. 33. Whether parol evidence would be admissible in such case to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered; *quære*, and see Loomis *v.* Green, 7 Greenl. 386.

them, a judgment in trover recovered against one would constitute a bar to a subsequent action against the other for money had and received, even though it were capable of proof, that the proceeds of the sale had exceeded the amount of the damages awarded in the first action.[1] So, a verdict for the defendant in trover, on a plea denying the plaintiff's title to the goods, is a bar to an action for the money arising from the sale of them, because in both these actions the same question of property must necessarily arise.[2] In an action for mesne profits, to a plea of not possessed, the plaintiff may reply, by way of estoppel, a judgment in ejectment in his favour, whether that judgment be by verdict or by default, and whether it has been followed or not by the issue and execution of a writ of possession.[3] So, a verdict for the defendant in replevin, where, to an avowry for rent the plaintiff had pleaded non tenuit, has been held to conclude the plaintiff, when subsequently sued by the party under whom he had made cognizance, for the rent which had accrued at the time of the distress.[4] So, where, prior to the 10th of August, 1854, when the laws relating to usury were repealed,[5] the defendant pleaded usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, was held to be admissible in evidence for the plaintiff.[6]

§ 1509. But, on the other hand, the prior recovery of damages in an action for false imprisonment cannot be pleaded in bar to a subsequent action for malicious prosecution, even though it should appear that the jury on the first trial had been misdirected by the judge to take into their consideration the malicious conduct of the defendant.[7] Neither will a verdict for the defendant in trover, on a plea of not guilty, prevent him from being liable to the plaintiff for the proceeds of the sale in an action for money had and received; because in such a case it is clear that the verdict in

[1] Buckland v. Johnson, 23 L. J., C. P., 204 ; 15 Com. B. 145, S. C.
[2] Hitchin v. Campbell, 2 W. Bl. 827, 831, 832 ; 3 Wils. 304, S. C.
[3] Wilkinson v. Kirby, 23 L. J., C. P., 224 ; 15 Com. B. 430, S. C. See ante, § 1500.
[4] Hancock v. Welsh, 1 Stark. R. 347.
[5] 17 & 18 Vict., c. 90.
[6] Cleve v. Powel, 1 M. & Rob. 228, per Lord Denman.
[7] Guest v. Warren, 23 L. J., Ex., 121 ; 9 Ex. R. 379, S. C.

trover might have been given on the express ground, that the defendant had sold the goods in question on the authority of the plaintiff.[1] Again, if an action on the case were brought for obstructing a watercourse, and the plaintiff were to obtain a verdict on the mere plea of not guilty, this would not preclude the defendant from disputing the plaintiff's right to the watercourse, should he bring a second action against the defendant for a subsequent obstruction.[2] So, if to an action for trespassing on a close, whether described by abuttals or name, the defendant plead liberum tenementum, and obtain a verdict, this record will not, of itself, estop the plaintiff from bringing a second action for a trespass committed on the same close; for, as the defendant, to support this plea, need not prove his title to the *whole* close, but may rest satisfied with showing that the *part* of the close on which the trespass was committed belongs to him, it follows that the only effect of the record in a subsequent action between the same parties, or those claiming under them, will be to prove, that *some* part of the close is the defendant's property; and this will not bar the plaintiff's right, unless it can be further shown, that the trespasses in the two actions were committed in the same part.[3]

§ 1510. It matters not in regard to the conclusive effect of a judgment, whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the *point in dispute* be *the same* in both suits. Therefore, if an action be brought for goods sold and delivered with a warranty, or for work and labour done, or for goods supplied, under a contract, and the defendant elect to show, as he may do, how much less the subject-matter of the action was worth, by reason of a breach of the warranty or contract; he will be considered as having satisfaction for the breach, to the extent that he obtained, or was capable of obtaining, an abatement of price on that account;

[1] Hitchin *v.* Campbell, 2 W. Bl. 779, 832; as explained in Buckland *v.* Johnson, 15 Com. B. 161, 162.

[2] Evelyn *v.* Haynes, per Lord Mansfield, cited and explained by Lord Ellenborough in Outram *v.* Morewood, 3 East, 365.

[3] Smith *v.* Royston, 8 M. & W. 386—388, per Alderson, B.

and to that extent, but not further, he will be precluded from recovering in another action.[1] So, a verdict negativing any right which a defendant sets up in his plea, will estop him from asserting that right as plaintiff in a subsequent action against his former opponent.[2] For instance, if to an action on contract, the defendant plead a set-off, and the issue thereon be found against him, he cannot afterwards sue the plaintiff for the demand specified in that plea;[3] and the more especially so, as a plea of set-off may now be taken distributively.[4]

§ 1511. In applying this rule to *cross actions*, care must be taken to distinguish between cases, were the points in issue are identical, and those, where both suits *merely relate to the same transaction or property*. In the latter case the recovery of a verdict by the plaintiff in one action will not estop the defendant from bringing a subsequent action against him. Thus, where the purchaser of a kitchen range, on being sued for the stipulated price, paid 40*l.* into court, which the maker took out in satisfaction of the cause of action; it was held that the purchaser was not estopped thereby from suing the maker for negligence in the construction of the range.[5] So, it frequently happens in running down cases, that both parties commence proceedings against each other; and as a verdict on the first trial is no evidence on the second, juries occasionally find verdicts in favour of both plaintiffs, in order, as it would seem, to illustrate the humiliating doctrine that no human institutions are perfect.[6]

[1] Mondel *v.* Steel, 8 M. & W. 858, 871, 872. See Thornton *v.* Place, 1 M. & Rob. 218.

[2] 2 Smith's Lead. Cas. 442.

[3] Eastmure *v.* Laws, 5 Bing. N. C. 444; 7 Scott, 461; 7 Dowl. 431, S. C. See Stanton *v.* Styles, 1 L. M. & P. 575.

[4] See ante, § 220.

[5] Rigge *v.* Burbidge, 15 M. & W. 598; 4 Dowl. & L. 1 S. C.

[6] In a recent case of collision in the Court of Admiralty, where cross actions had been brought, Dr. Lushington, after observing that the records of that court showed, that scarcely ever was a case of collision tried in which a true statement of facts was made on both sides, confessed that he was unable to come to any satisfactory decision on the conflict of evidence; and as the Trinity masters, whom he had called in, found themselves equally incapable of determining the matter, the result was that both actions were dismissed. In re Maid of Auckland, 6 Ec. & Mar. Cas. 240. The rule of

§ 1512. A convenient and safe *test* for ascertaining whether or not the judgment in one action should be a bar to another, is to consider *whether the same evidence would or would not sustain both.*[1] But if the declarations be framed in such a manner, that the causes of action *may* be identical in the two suits, the party bringing the second action must show that they are not the same, for he has no right to leave the question of identity to be determined, on a nice investigation of the facts and pleadings.[2] In one case, indeed, where the plaintiff had in a former action declared upon a promissory note, and for goods sold, but, upon executing the writ of inquiry after judgment by default, he had not been prepared with evidence on the count for goods sold, and had therefore taken his damages for the amount only of the note; he was permitted, in a second action for the goods sold, to prove this fact by parol, and the first judgment was held to be no bar to the second suit.[3] In another case, too, a plaintiff declared in debt for use and occupation of a farm, with the usual money counts, and in his particulars of demand he claimed a certain sum for the value of stone taken from a quarry on the farm. At the trial he confined his evidence to the count for use and occupation, and obtained a general verdict. Before this action was tried, the plaintiff brought another against the same defendant for quarrying and taking away stone; and the Court held, on the trial of the action on the case, that the tort was not waived by the plaintiff's abandonment of his claim for the value of the stone as stated in the particulars, and that, consequently, the second action was maintainable notwithstanding the former recovery.[4]

the Admiralty Court in cases of collision, when both parties are blameable in not having taken necessary precautions, is to apportion the damages equally between them; Vaux *v.* Sheffer, 8 Moo. P. C. R. 75.

[1] Hitchin *v.* Campbell, 2 W. Bl. 831, per De Grey, C. J.; Martin *v.* Kennedy, 2 B. & P. 71, per Lord Eldon; Wadsworth *v.* Bentley, 23 L. J., Q. B., Bail Ct. 3, per Crompton, J.

[2] Lord Bagot *v.* Williams, 3 B. & C. 239, per Abbott, C. J.; Seddon *v.* Tutop, 6 T. R. 609, per Lord Kenyon.

[3] Seddon *v.* Tutop, 6 T. R. 607; recognised by Bayley, J., in Lord Bagot *v.* Williams, 3 B. & C. 240; and by Best, C. J., in Thorpe *v.* Cooper, 5 Bing. 129.

[4] Hadley *v.* Green, 2 Tyrw. 390. See acc. Bridge *v.* Gray, 14 Pick. 55; Webster *v.* Lee, 5 Mass. 334; Phillips *v.* Berrick, 16 Johns. 136.

§ 1513. On the other hand, it has been laid down as a general rule, which is recognised alike in courts of law and of equity, that "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."[1]

§ 1514. Many cases in Chancery might be cited in illustration of the above rule,[2] but it will suffice to refer to a few common-law decisions connected with this subject. Thus, it has been determined, that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards, to avoid delay attends before the Master to have his damages assessed on one item only, and enters a nolle prosequi as to the others, this will bar any future action for the last-mentioned items; a nolle prosequi as to part, entered up after judgment for the whole, being equivalent to a retraxit.[3] A fortiori, if a plaintiff having declared on several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he elects to be nonsuited generally, or can induce the Court to set aside the verdict he has obtained.[4] So, if he sues for part only of an indivisible claim, as if one serves another for a year under the same hiring,

[1] Henderson *v.* Henderson, 3 Hare, 115, per Wigram, V.-Ch.

[2] Farquharson *v.* Seton, 5 Russ. 45; Partridge *v.* Usborne, id. 195; Chamley *v.* Lord Dunsany, 2 Sch. & Lef. 718, per Lord Eldon; M. of Bredalbane *v.* M. of Chandos, 2 Myl. & Cr. 732, 733, per Lord Cottenham.

[3] Bowden *v.* Horne, 7 Bing. 716.

[4] Stafford *v.* Clark, 2 Bing. 382, per Best, C. J.

and then brings an action for a month's wages, it is a bar to the whole.[1] Upon the same principle, if a plaintiff, knowing that he has an unliquidated claim against a defendant for a large amount, chooses to sue him for a less sum than is due; or if, having a demand for 60*l.*, in three sums of 20*l.*, he consents at Nisi Prius to take a verdict for 40*l.*, he cannot afterwards bring a second action for the residue.[2] So, if all matters in difference between two parties are referred, and one of them declines to bring before the arbitrator some claim which is included within the scope of the reference, he cannot make this claim the subject of a fresh action.[3]

§ 1515. The original County Court Act[4] contains an important clause relative to this subject; for it enacts, in § 63, "that it shall not be lawful for any plaintiff to divide any *cause of action* for the purpose of bringing two or more suits in any of the [County] Courts,[5] but any plaintiff, having cause of action for more than" 50*l.*,[6] "for which a plaint might be entered under this Act if not for more than" 50*l.*,[7] "may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding" 50*l.*;[8] "and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." The term, "cause of action," here employed is one of indefinite import; but the Courts have fixed its meaning to a certain extent, by holding, first, that it is not limited to a cause of action on *one separate entire contract*, but that it extends to tradesmen's bills, where the dealing is intended to be continuous, and where the items are so far *connected* with each other, that if they be not paid,

[1] Miller *v.* Covert, 1 Wend. 487.

[2] Lord Bagot *v.* Williams, 3 B. & C. 235, 241.

[3] Smith *v.* Johnson, 15 East, 213; Dunn *v.* Murray, 9 B. & C. 780, 788. See Ravee *v.* Farmer, 4 T. R. 146.

[4] 9 & 10 Vict., c. 95. The Act of 14 & 15 Vict., c. 57, which regulates the practice in Irish Civil Bill Courts, contains similar provisions in § 36.

[5] "These words do not, in terms, prohibit the splitting a demand, for the purpose of bringing one suit in the County Court, and another in the Superior Court;" per Maule, J., in Vines *v.* Arnold, 8 Com. B. 638.

[6] 13 & 14 Vict., c. 61, § 1. [7] Id. [8] Id.

they form one entire demand;[1] and next, that it does not preclude the plaintiff from bringing distinct plaints, whenever the claims are of such a nature as would justify the introduction of two or more counts in the declaration, if the action were brought in one of the Superior Courts.[2] In conformity with this last rule, a landlord has been allowed to sue his tenant in one plaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit.[3]

§ 1516. The rule requiring an *identity* in the *points at issue*, but allowing a *diversity in the forms* of proceeding, has hitherto been illustrated by referring to cases, where a judgment recovered in one action has, or has not, been regarded as a bar to a second action. The same doctrine, however, will be found to prevail in *criminal prosecutions;* and therefore, although, in order to warrant a prisoner in pleading autrefois acquit, or autrefois convict, the form of the two indictments, or even the nature of the charges need not be identical, yet, unless the first indictment were one, upon which the prisoner might have been convicted by proof of the facts necessary to support the second indictment, an acquittal or conviction on the first trial will be no bar to the second. Thus, if a prisoner, indicted for burglariously breaking and entering a house and stealing therein certain goods of A., be acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house, and stealing other goods of B.[4] Neither will his acquittal on a charge of burglary and stealing avail him on an indictment for burglary with intent to steal.[5] So, an acquittal for the larceny of goods would seem to be no bar to an indictment for obtaining the same goods under false pretences; but this point is not free from doubt, as under either of the Acts of 7 & 8 Geo. 4, c. 29, § 53, or 14 & 15 Vict. c. 100, § 12,[6] the prisoner might be convicted of the mis-

[1] In re Aykroyd, 1 Ex. R. 479.

[2] Wickham *v.* Lee, 12 Q. B. 526, per Erle, J.

[3] Id., 521.

[4] Per Buller, J., delivering the opinion of all the judges in R. *v.* Vandercomb, 2 Lea. C. C. 718, 719, and overruling Turner's case, Kel. 30, and Jones & Beaver's case, Kel. 52.

[5] R. *v.* Vandercomb, 2 Lea. C. C. 716—721.

[6] Cited post, p. 1366, n. 3.

demeanor on the second indictment, though the evidence were to establish the fact, that a felony had been committed.[1]

§ 1517. So, upon an indictment for the statutable felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar.[2] So, if a prisoner be charged with rape and acquitted, he may still, if the facts warrant such a course, be indicted for an assault with intent to commit that crime.[3] So, where two or more persons have committed successive rapes upon the same woman, though one of them be acquitted when charged as a principal in the first degree, he may still be indicted for being present aiding and abetting the others to commit the crime.[4] So, although a prisoner be acquitted of receiving stolen goods from A. B. knowing them to have been *so* feloniously stolen, he may still, as it seems, be indicted for the substantive felony of receiving stolen property with a guilty knowledge; and the record of his former acquittal will not avail him, unless it be proved that the goods, if received by him at all, were received from A. B., by whom they were taken from the original owner.[5] So, if an insolvent debtor be indicted for omitting certain goods out of his schedule, his acquittal or conviction will be no bar to a second prosecution against him for omitting other goods, though as such a course of proceeding savours of oppression, it would under ordinary circumstances be discountenanced by the judge.[6] In all these cases, and in many others of a similar nature, the prisoner could not by possibility have been legally convicted on the first indictment of the offence charged in the second; and therefore the ancient maxim of the common law, that no man shall be twice brought into jeopardy for the same crime, is in no respect contravened by the second trial.

[1] See R. *v.* Henderson, 2 Moo. C. C. 192, 198, 199.

[2] R. *v.* Connell, 6 Cox, Cr. Cas. 178, per Williams and Talfourd, Js.

[3] R. *v.* Gisson, 2 C. & Kir. 781, per Pollock, C. B.

[4] See R. *v.* Parry, 7 C. & P. 836.

[5] R. *v.* Woolford, 1 M. & Rob. 384, per Patteson, J.; R. *v.* Dann, 1 Moo. C. C. 424. But see 11 & 12 Vict., c. 46, § 2, which throws much doubt on this law.

[6] R. *v.* Champneys, 2 M. & Rob. 26, per Patteson, J.; 2 Lew. C. C. 52, S. C.

§ 1518. On the other hand, an acquittal on an indictment charging the prisoner as a principal felon, will now[1] be a bar to an indictment against him as an accessory before the fact; because, under a recent Act,[2] "if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." Again, no person tried for any misdemeanor is liable, unless the jury have been discharged from giving a verdict, to be afterwards prosecuted for felony on the same facts,[3] because, as stated in a former section,[4] he may be convicted of the misdemeanor, though a felony be proved. For a similar reason, no person tried for embezzlement as a clerk or servant, or as a person employed in either of those capacities, can be afterwards indicted for larceny upon the same

[1] The law was formerly otherwise. See R. v. Birchenough, 1 Moo. C. C. 477; S. C. nom. R. v. Plant, 7 C. & P. 575.

[2] 11 & 12 Vict., c. 46, § 1.

[3] 14 & 15 Vict., c. 100, § 12, enacts, that "If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the Court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." In R. v. Shott, 3 C. & Kir. 206, where a prisoner was indicted for the misdemeanor of carnally knowing a girl between the ages of ten and twelve, and it turned out at the trial that the girl was under ten, and that consequently a felony had been committed, Maule, J., is reported to have held that the above section did not apply, and that the prisoner was entitled to an acquittal. According to his lordship's view, "the section only applies to cases of *merger*; *e. g.*, the case of false pretences, where the facts prove that the false pretences have been effected by a forgery." *Sed quære*, as this seems to be a very unwarrantable limitation of the language of the Legislature. The proper course in such a case would appear to be, to discharge the jury from giving any verdict upon the trial for the misdemeanor, and to direct a fresh bill to be preferred for felony.

[4] Ante, § 1516, ad fin. See also 20 & 21 Vict., c. 54, § 14, which enacts, with respect to fraudulent trustees, that "if upon the trial of any person under this Act it shall appear that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of a misdemeanor under this Act."

facts, and no person tried for larceny is liable to a second prosecution for embezzlement.[1] So, if a prisoner be indicted for a compound crime, and be wholly acquitted, he cannot be afterwards charged with any offence included in such crime; because, in these cases, the prisoner, though acquitted of the more serious charge, might still, on the first indictment, have been found guilty of the lighter offence. For instance, if one has been acquitted on an indictment for murder, he is protected against a second prosecution for manslaughter;[2] and indeed, if a party be charged with any felony or misdemeanor, and be wholly acquitted, he cannot be subsequently indicted for an attempt to commit the same crime, since, on the first indictment, the jury may now acquit of the felony or misdemeanor charged, and find a verdict of guilty of the attempt, if the evidence shall warrant such finding.[3] So, if a person be indicted for robbery, for stealing in a dwelling-house, for burglary in breaking into a house and stealing goods, for larceny as a servant,[4] or for stealing from the person, and be generally acquitted, the acquittal will be a bar to any future indictment for the simple larceny;[5] and if a man be tried for robbery, he will also be protected from any second prosecution for assaulting with intent to rob.[6]

§ 1519. It seems too, that the converse of this rule holds good; and therefore, if a prisoner be acquitted or convicted of manslaughter, or of simple larceny, he cannot afterwards be indicted for the murder of the same person,[7] or for compound larceny with respect to the same property.[8] So far has this doctrine been carried, that a summary conviction by justices for an aggravated assault upon a woman or child, under 16 & 17 Vict., c. 30, § 1, is rendered by the statute "a bar to all future proceedings, civil or

[1] 14 & 15 Vict., c. 100, § 13. [2] 2 Hale, P. C. 246.

[3] 14 & 15 Vict. c. 100, § 9, cited ante, § 218. See also 14 & 15 Vict., c. 19, § 5.

[4] R. v. Jennings, 1 Dear. & Bell, C. C. 447.

[5] See 1 Russ. C. & M. 837, 838, note by Mr. Greaves. See R. v. Compton, 3 C. & P. 418.

[6] 14 & 15 Vict., c. 100, § 11. See R. v. Mitchell, 2 Den. 468.

[7] 2 Hale, P. C. 246; Holcroft's case, 4 Rep. 46 b; Foster's C. L. 326.

[8] R. v. Berigan, Ir. Cir. R. 177, 184—186, per Crampton, J.; id. 195, n.

criminal, for or in respect of the same assault." If, therefore, through a mistake on the part of the prosecutor, or through the ignorance or inattention of the officer of the court, a bill be preferred for manslaughter or larceny, and it should come out in evidence, that the offence amounted to murder in the one case, or to robbery, burglary, stealing in a dwelling-house, or stealing from the person, in the other, the judge should by no means direct the jury to acquit; but, if the circumstances be of an aggravated nature, he should discharge the jury of that indictment, and order a fresh one to be preferred.[1]

§ 1520. Having thus pointed out the distinction which exists between the admissibility and effect of judgments in rem and of judgments inter partes, it will be expedient to refer shortly to some rules which govern equally both classes of instruments. And first, it is laid down as an unquestionable rule of law, that neither a judgment in rem, nor a judgment inter partes, is *evidence of any matter which may or may not have been controverted*, or which came *collaterally* in question, or which was *incidentally cognizable*, or which can only be *inferred by argument* from the judgment.[2] For instance, on an appeal against an order of removal, where the respondents relied on a derivative settlement from the pauper's father, they were not allowed to put in a previous order for the removal of the pauper's brother to the appellant parish, together with the examinations on which it was founded, though these examinations clearly proved that the brother's settlement was derived from the father.[3] The order in this case for removing the brother was silent as to the ground of removal, and the Court held that the examinations, being no part of the record, could not be used to prove the particular species of settlement on which it rested.[4]

§ 1521. So, where an action of trover was brought against the

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[1] See Foster's C. L. 327, 328.

[2] R. *v.* Duchess of Kingston, 20 How. St. Tr. 538; 2 Smith's Lead. Cas. 425, S. C.

[3] R. *v.* Sow, 4 Q. B. 93; R. *v.* Knaptoft, 2 B. & C. 883; explained in R. *v.* Hartington Middle Quarter, 4 E. & B. 795, 796.

[4] 4 Q. B. 98. See ante, § 733, ad fin.

administrator of a woman by a man who claimed to be her widower, and the defendant relied on the letters of administration, insisting that they could not have been granted to him but upon the supposition that the plaintiff and the intestate had never been married, the Court held, that, inasmuch as that question had never been put in issue and decided in the Ecclesiastical Court, they were not at liberty to infer from the grant of administration, that the parties were unmarried.[1] So, the probate of a will, purporting to have been made by a married woman in pursuance of a power, furnishes no evidence whatever that the power has been duly executed; because the Court of Probate has simply to determine on the validity of the instrument as an ordinary will of an ordinary person, and in case no valid objection can be taken to it, when regarded in this light, it is incumbent on the Court to grant probate, and to leave the question respecting the due execution of the power to be decided by the Court of Chancery.[2] So, where to debt on bond the defendant had pleaded a usurious agreement between the plaintiff and himself, and had averred that the bond was given in pursuance thereof; and issue having been joined on a traverse of this latter averment, the defendant had a verdict; the Court held that, in a subsequent action on a collateral security for the same debt, the plaintiff was not estopped by the former judgment from disproving the usurious agreement, inasmuch as the existence of such agreement had not been directly in issue in the action on the bond.[3]

§ 1522. In the next place, no doubt can be entertained that wherever a judgment is offered in evidence against a *stranger*, he may avoid its effects, by furnishing distinct proof that it was obtained by *fraud* or *collusion*. To borrow the language of Lord Chief Justice De Grey, "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal."[4] In applying

[1] Blackham's case, 1 Salk. 290, 291, per Lord Holt; cited and explained by Lord Lyndhurst in Barrs *v.* Jackson, 1 Phill. Ch. R. 588, 589.

[2] Barnes *v.* Vincent, 5 Moo. P. C. R. 201. See Ward *v.* Ward, 11 Beav. 377.

[3] Carter *v.* James, 13 M. & W. 137.

[4] R. *v.* Duchess of Kingston, 20 How. St. Tr. 544; 2 Smith's Lead. Cas.

this rule it matters not whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[1] Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur.[2] Whether an *innocent party* would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in *his* power to apply directly to the Court which pronounced the judgment to vacate it;[3] but, however this point may be ultimately determined, thus much is evident, that a *guilty party* would not be permitted to defeat a judgment, by showing that, in obtaining it, he had practised an imposition on the Court; for it would be an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct.[4]

§ 1523. Again, every species of judgment will be rendered inadmissible in evidence, by showing that the Court from which it emanated had no *jurisdiction*.[5] For instance, if, before the 11th of January, 1858,[6] an executor or administrator had sued on a

431, 432; Brownsword *v.* Edwards, 2 Ves. Sen. 246, per Lord Hardwicke; Philipson *v.* Earl of Egremont, 6 Q. B. 605, per Lord Denman; Meddowcroft *v.* Huquenin, 4 Moore, P. C. R. 386; Perry *v.* Meddowcroft, 10 Beav. 122; Harrison *v.* Corp. of Southampton, 4 De Gex, M. & Gord. 137.

[1] Shedden *v.* Patrick, 1 Macq. Sc. Cas. H. of L. 535.

[2] Per Wedderburn, S. G., in R. *v.* Duchess of Kingston, 20 How. St. Tr. 479; cited by Lord Cranworth in Shedden *v.* Patrick, 1 Macq. Sc. Cas. H. of L. 608.

[3] Prudham *v.* Phillips, 2 Ambl. 763; 20 How. St. Tr. 479, 480, note, S. C.; R. *v.* Duchess of Kingston, 20 How. St. Tr. 544; Shedden *v.* Patrick, 1 Macq. Sc. Cas. H. of L. 535. See Ex parte White *v.* Tommey, 4 H. of L. Cas. 313.

[4] Prudham *v.* Phillips, 2 Ambl. 763; 20 How. St. Tr. 479, 480, note, S. C. See Doe *v.* Roberts, 2 B. & A. 367; Bessey *v.* Windham, 6 Q. B. 166.

[5] R. *v.* Bishop of Chester, 1 W. Bl. 25, per Lee, C. J., as to sentences of visitors; R. *v.* Washbrook, 4 B. & C. 732, as to awards by public commissioners; Mann *v.* Owen, 9 B. & C. 595, as to sentences of Courts-Martial. See also Briscoe *v.* Stephens, 2 Bing. 213; 9 Moore, 413, S. C.; and Archbishop of Dublin *v.* Lord Trimleston, 12 Ir. Eq. R. 251, 267, 268.

[6] When the Probate Acts of 1857, for England and Ireland, came into operation.

probate or letters of administration granted by a diocesan, the defendant might have defeated his title, by pleading and proving that the testator, or intestate, had bona notabilia in other dioceses within the same province; because, under the old law, the metropolitan, and not the diocesan, would, in such a case, have had jurisdiction to grant probate or administration.[1] This law is here referred to for the purpose of pointing out that it no longer exists, the Probate Acts of 1857 for England and Ireland having respectively enacted,[2] that all grants of probates and administrations made before the 11th of January, 1858, which may be void or voidable by reason only that the Courts from which they were obtained had not jurisdiction to make them, shall be as valid as if they had been made by Courts having jurisdiction. Again, a probate or letters of administration may still be defeated by proving that the supposed testator or intestate is alive; for, in this event, the Court of Probate can have no jurisdiction, nor its sentence any effect.[3] So, if a prisoner were tried before the Quarter Sessions, on a day to which the Court had not been duly adjourned,[4] or for an offence which the justices are by statute restrained from trying,[5] his acquittal or conviction would

[1] Marriot v. Marriot, 1 Stra. 671; Stokes v. Bate, 5 B. & C. 491; 3 D. & R. 247, S. C.; B. N. P. 247. See also Huthwaite v. Phaire, 1 M. & Gr. 159; Whyte v. Rose, 3 Q. B. 493; Easton v. Carter, 5 Ex. R. 8.

[2] 20 & 21 Vict., c. 77, § 86; 20 & 21 Vict., c. 79, § 91, Ir.

[3] Allen v. Dundas, 3 T. R. 129, 130, per Ashhurst and Buller, Js.

[4] R. v. Bowman, 6 C. & P. 337.

[5] These crimes are treason, murder, capital felony, or any felony, which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life; or any of the following offences:—

1. Misprision of treason;
2. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament;
3. Offences subject to the penalties of præmunire;
4. Blasphemy, and offences against religion;
5. Administering or taking unlawful oaths;
6. Perjury and subornation of perjury;
7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor;
8. Forgery;
9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern;

be no bar to a future indictment for the same offence, because the former proceedings, being coram non judice, would be a mere nullity.

§ 1524. Questions of jurisdiction most frequently arise with regard to summary convictions by magistrates, orders of justices, inquisitions found by sheriff's juries, and other judicial proceedings of inferior tribunals; and here,—although, as already explained,[1] an adjudication of this kind cannot be impeached by disproving the facts stated in it, not excepting those which are necessary to give jurisdiction,—yet still, the parties against whom it is offered in evidence may establish its invalidity, either by proving any extrinsic facts, which show that the person or Court pronouncing it had no authority *to enter into the inquiry*,[2] or by pointing out the circumstance, that the adjudication itself does not disclose facts sufficient to give jurisdiction.[3] Thus, if justices

10. Bigamy; and offences against the laws relating to marriage ;
11. Abduction of women and girls ;
12. Endeavouring to conceal the birth of a child ;
13. Offences against any provision of the laws relating to bankrupts and insolvents ;
14. Composing, printing, or publishing, blasphemous, seditious, or defamatory libels ;
15. Bribery ;
16. Unlawful combinations and conspiracies, or combinations to commit any offence, which such justices or recorder respectively have or has jurisdiction to try when committed by one person ;
17. Stealing, or fraudulently taking, or injuring, or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein ;
18. Stealing, or fraudulently destroying or concealing, wills or testamentary papers, or any document or written instrument being, or containing evidence of, the title to any real estate, or interest in lands, tenements or hereditaments.
19. Any misdemeanor against the Fraudulent Trustee Act of 1857. See 5 & 6 Vict., c. 38 ; 5 & 6 Vict., c. 43 ; 20 & 21 Vict., c. 3 ; and 20 & 21 Vict., c. 54, § 16.

[1] Ante, §§ 1482—1485.

[2] R. *v.* Bolton, 1 Q. B. 66 ; R. *v.* Somersetshire Js., 5 B. & C. 816 ; cited by Patteson, J., in In re Clarke, 2 Q. B. 634, 635.

[3] In re Clarke, 2 Q. B. 634, per Patteson, J. ; ante, § 126. See Ayrton *v.* Abbott, 14 Q. B. 1 ; Branwell *v.* Pennock, 7 B. & C. 536 : Bailey's case and Collier's case, 3 E. & B. 607 ; R. *v.* St. George, Bloomsbury, 4 E. & B. 520 ; Staverton *v.* Ashburton, id. 526.

have acted in a matter not regularly before them, as if they should have proceeded to remove a pauper without any complaint being made by the parish officers, this may be shown by evidence, and will be fatal to their order.[1] So, where a justice had convicted a baker by four separate convictions of selling bread upon the same Sunday, and an action of trespass was brought against him, the Court held that he could not rely upon the convictions as a defence, since he had exceeded his authority in imposing more than one penalty for the same day, and, therefore, three of the convictions were of necessity void.[2] The rule which renders it necessary that the order, on its face, should contain a statement of all facts which are requisite to show jurisdiction, is not confined to orders of justices; but whenever a *special statutory power is exercised*, whether the order be made by a magistrate or by the Lord Chancellor, the facts which gave the authority must be stated.[3]

§ 1525. It may be here convenient to furnish a few instances in which the judicial proceedings of inferior tribunals have been quashed or otherwise treated as nullities, on the ground that they did not set forth sufficient facts to show jurisdiction. In R. *v.* Hulcott,[4] an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry; this being a fact upon which their jurisdiction depended, and which it was their duty to ascertain. In Kite & Lane's case,[5] a conviction was quashed on an objection that it did not show that the justices were of that district, to the justices of which alone the Act gave jurisdiction. So, where the jurisdiction of the magistrates to take the examination of a soldier depended, under the Mutiny Act, upon the fact of his being quartered at Southampton; the circumstance that this fact, which the magistrates were bound to have ascertained, was

[1] R. *v.* Buckinghamshire Js., 3 Q. B. 807, per Lord Denman, explaining R. *v.* Bolton, 1 Q. B. 66; Welch *v.* Nash, 8 East, 394.

[2] Cripps *v.* Durden, 2 Cowp. 640; recognised by Dallas, C. J., in Brittain *v.* Kinnaird, 1 B. & B. 430.

[3] Christie *v.* Unwin, 11 A. & E. 373, 378, 379, per Lord Denman, and Coleridge, J.

[4] 6 T. R. 583.

[5] 1 B. & C. 101.

neither stated in the examination, nor proved aliundè, rendered the examination inadmissible in evidence.[1] In Day *v.* King,[2] the facts that the applicant was a member of a friendly society, that he was entitled to the money, and that the party against whom the application was made was an officer of the society, were held to be not only necessary to give the justices jurisdiction, but to form part of what they had to decide; and as these facts were not mentioned in the order, it was deemed deficient. So, inquisitions have on several occasions been quashed, where it was the duty of the sheriff, or the trustees, before whom they were to be taken, to give certain preliminary notices to the parties interested, and such notices did not appear on the face of the proceedings to have been given.[3]

§ 1526. It will be observed, that, in all the cases just cited, the facts, averments of which were omitted on the face of the proceedings, were preliminary matters *cognizable by the authority* whence the proceedings emanated; and had not this been the case, it would seem that no objection on the ground of their omission could have prevailed. At least, this doctrine has been sanctioned, if not established, by Lord Chancellor Cottenham, who, in Taylor *v.* Clemson,[4] intimated a tolerably clear opinion, that it could not be necessary in any case that the proceedings of inferior tribunals should contain averments of any facts, into which those tribunals had no authority to inquire, and of which, therefore, they could have no judicial knowledge.[5]

§ 1527. The case of Taylor *v.* Clemson[6] is further important, as distinctly deciding, that no judicial proceeding of an inferior tribunal shall be deemed defective, for not stating facts that are

[1] R. *v.* All Saints, Southampton, 7 B. & C. 785.

[2] 5 A. & E. 359.

[3] R. *v.* Liverpool, Mayor of, 4 Burr. 2244; R. *v.* Bagshaw, 7 T. R. 363; R. *v.* Norwich Road Trustees, 5 A. & E. 563. See also R. *v.* Worcestershire Js., 3 E. & B. 477.

[4] 11 Cl. & Fin. 647—651, questioning a contrary doctrine suggested by Lord Mansfield in R. *v.* Croke, 1 Cowp. 30, and by Lord Denman in R. *v.* South Holland Drainage, 8 A. & E. 437.

[5] See also Ostler *v.* Cooke, 13 Q. B. 143.

[6] 11 Cl. & Fin. 610.

necessarily implied from those which are alleged. In that case the circumstances were as follows:—A Railway Act directed that if any landowner should not agree with the company as to the purchase money, or should refuse to accept the sum offered by the company, or should, after notice, neglect to treat, or should not agree with the company for the sale of his interest, the company might issue a warrant to the sheriff to summon a compensation jury. A warrant was issued, purporting to be under the Act, a jury was summoned, and an inquisition recorded, which last purported to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid, &c." Neither the warrant nor the inquisition stated that the owner had neglected to treat, or had had notice served on him, or had not agreed to sell; and it was consequently contended that these omissions were fatal to the proceedings; but the House of Lords, affirming a decision of the Exchequer Chamber,[1] held that the warrant and inquisition stated sufficient facts to show the jurisdiction of the sheriff and jury; for the impanelling a jury and the assessment by them, being facts inconsistent with an agreement between the company and the landowner, necessarily implied non-agreement.

§ 1528.[2] Again, it is only where the point in issue in the first suit, or other legal proceeding, has been actually *determined*, that the judgment delivered therein is a bar to any subsequent action. Therefore, if the action has been discontinued,[3] or the plaintiff has become nonsuit,[4] or, perhaps, if a bill has been dismissed without hearing evidence, and the decree has not been enrolled,[5] or if for any other cause no judgment of the Court has been pronounced upon the matter in issue, the proceedings are not conclusive.[6] Though the withdrawal of a juror, or the discharge of a

[1] 2 Q. B. 978.

[2] Gr. Ev., §§ 529, 530, in some part. [3] 3 Bl. Com. 296.

[4] 3 Bl. Com. 296, 376, 377; R. v. St. Anne, Westminster, 2 Sess. Cas. 529, per Lord Denman; 9 Q. B. 884, S. C.; Greely v. Smith, 1 Woodb. & Min. 181. [5] Joly v. Swift, 11 Ir. Eq. R. 410.

[6] Knox v. Waldoborough, 5 Greenl. 185; Hull v. Blake, 13 Mass. 155; Sweigart v. Berk, 8 Serg. & R. 305; Bridge v. Sumner, 1 Pick. 371.

jury, by consent, would seem to constitute no legal defence to a second action,[1] it is so far regarded as putting a final end to the litigation, that, if the plaintiff were to sue again for the same cause, the Court, on the application of the defendant, would stay the proceedings, and make the plaintiff pay the costs incurred.[2] Further, a judgment is inconclusive if it appears that the decision did not turn *upon the merits*; as, for instance, if the trial went off on a technical defect,[3] or for faults in the declaration or pleadings,[4] or because the action was misconceived,[5] or because the debt was not then due,[6] or because of a temporal disability of the plaintiff to sue,[7] or because the plaintiff had mistaken his character, and had sued as executor instead of administrator,[8] or the like. In Godson *v.* Smith,[9] an action of assumpsit was brought against an administratrix, to which she pleaded in abatement, that the intestate had promised jointly with sixteen others. At the trial it appeared that the promises were made by the intestate jointly with some forty persons, and the defendant having thus failed to establish her plea, the plaintiff had a verdict for nominal damages, and entered up satisfaction on the judgment. He then sued the co-contractors for the same demand, and the Court held that the previous judgment was no bar to his recovery.

§ 1529. In some cases it may be difficult to determine what constitutes a decision upon the merits, and this question has frequently been before the Court of Queen's Bench, in cases where *appeals* against *orders of removal* have been allowed by the Sessions.[10] Thus much, however, is clear with respect to this

[1] Sanderson *v.* Nestor, Ry. & M. 402; Everett *v.* Youells, 3 B. & Ad. 349.

[2] Gibbs *v.* Ralph, 14 M. & W. 804.

[3] Lepping *v.* Kedgewin, 1 Mod. 207; Lane *v.* Harrison, 6 Munf. 573; M'Donald *v.* Rainor, 8 Johns. 442.

[4] Hitchin *v.* Campbell, 2 W. Bl. 831, per De Grey, C. J.

[5] Id.

[6] New Eng. Bank *v.* Lewis, 8 Pick. 113.

[7] Dixon *v.* Sinclear, 4 Verm. 354.

[8] Hitchin *v.* Campbell, 2 W. Bl. 831, per De Grey, C. J.; Robinson's case, 5 Rep. 33.

[9] 2 Moore, 157.

[10] See R. *v.* Lancashire, 3 Q. B. 367; R. *v.* Evenwood Barony, id. 370; R. *v.* Charlbury, id. 378; R. *v.* Kingsclere, id. 388; R. *v.* Perrenzabuloe, id. 400; Ex parte Pontefract, id. 391; Ex parte Ackworth, id. 397; R.

particular class of cases, that if the order has been quashed for informalitity,[1] or because the pauper was not chargeable[2] or removeable[3] at the time when it was made, the allowance of the appeal will not preclude the respondent parish from obtaining a second order of removal; and if it does not appear on the face of the former proceedings, that the order of justices was quashed "not on the merits," parol evidence will be admissible to explain the particular ground upon which it was quashed;[4] although, in the absence of such evidence, the Court will presume, that the order of Sessions for quashing it was an adjudication upon the settlement.[5] If the Sessions, in quashing an order of removal, make an entry that it is quashed "not on the merits," this will conclusively prevent the order of Sessions from operating as an estoppel between the parishes; and, consequently, on the hearing of an appeal against a subsequent order respecting the same settlement, the appellants will not be allowed to show that the former order was, in fact, quashed on the merits.[6] The mere dismissal of an application made to justices out of Sessions is seldom, if ever, regarded as a final adjudication, so as to operate as a bar to further inquiry.[7]

§ 1530. It seems almost needless to observe, that a party, against whom a judgment is offered in evidence, may always defeat its effect, by showing that it has been *reversed*.[8] This

v. Clint, 11 A. & E. 624; R. *v.* St. Mary, Lambeth, 7 Q. B. 587; 2 Sess. Cas. 36, S. C.; R. *v.* Ellel, 7 Q. B. 593; 2 Sess. Cas. 39, S. C.

[1] R. *v.* Penge, Nolan's Rep. 176; R. *v.* Cottingham, 2 A. & E. 250; R. *v.* Great Bolton, 7 Q. B. 387.

[2] Osgathorpe *v.* Diseworth, 2 Stra. 1256; Burr. Sess. Cas. 261, S. C.; R. *v.* Wheelock, 5 B. & C. 511.

[3] R. *v.* Wick St. Lawrence, 5 B. & Ad. 526.

[4] R. *v.* Wheelock, 5 B. & C. 511; R. *v.* Wick St. Lawrence, 5 B. & Ad. 526; R. *v.* Widecombe in the Moor, 2 Sess. Cas. 539; 9 Q. B. 894, S. C.; R. *v.* Leeds, 9 Q. B. 910; R. *v.* Macclesfield, 13 Q. B. 881.

[5] R. *v.* Wick St. Lawrence, 5 B. & Ad. 535, per Parke, J.; R. *v.* Yeoveley, 8 A. & E. 806, 818, per Lord Denman.

[6] R. *v.* St. Anne, Westminster, 2 Sess. Cas. 525; 9 Q. B. 878, S. C.

[7] R. *v.* Machen, 14 Q. B. 74. See post, § 1564.

[8] 2 Smith's Lead. Cas. 438; Hynde's case, 4 Rep. 71 b, cited in Doe *v.* Wright, 10 A. & E. 775; Nowlan *v.* Gibson, 12 Ir. Law R. 5; R. *v.* Drury, 3 C. & Kir. 193; Wood *v.* Jackson, 8 Wend. 9.

rule applies to all courts alike, and therefore the title of an executor or administrator may be successfully disputed by proof that the probate or letters have been revoked.[1] So, if a prisoner has been found guilty upon an indictment, which, on a case reserved for the judges, has been pronounced bad in law, he may again be put upon his trial for the same offence, because he has never yet been in real jeopardy.[2] It is not equally obvious, though the law on the subject is now settled, that the *pendency of proceedings in error* or an appeal will not prevent the judgment from operating as a bar.[3] It follows à fortiori from this rule, that no objection can be taken to the binding effect of a judgment as evidence, on the ground that the declaration is so defective, that it would have been adjudged bad on demurrer.[4]

§ 1531. In some few cases the *effect of a judgment will materially vary*, according as it has been pronounced *in favour of the one or the other* party. Thus, while an order of Sessions confirming an order of removal is conclusive against all the world, that the pauper, at the date of the first order, was settled in the parish to which he was sent, an order of Sessions quashing an order of removal is conclusive between the contending parties alone, and that too, only as to the point which it decides, namely, that, at the time when the order of removal was made, the appellant parish was not bound to receive the pauper.[5] Again, if the inhabitants of a parish be indicted for the non-repair of a road, and be convicted, this will furnish conclusive evidence of their liability to do the repairs, in the event of a subsequent indictment being brought against them; but an acquittal on such an indictment will not establish the non-liability of the defendants, because it might have proceeded on the ground that the road was not out of repair, and thus, the question of liability might not have been decided.[6] Whether an acquittal on an infor-

[1] B. N. P. 247.

[2] R. *v.* Reader, 4 C. & P. 245; cited in R. *v.* Bowman, 6 C. & P. 342.

[3] Doe *v.* Wright, 10 A. & E. 763, 783; 1 P. & D. 673, S. C.

[4] Hughes *v.* Blake, 1 Mason, 515, 519, per Story, J.

[5] R. *v.* Wick St. Lawrence, 5 B. & Ad. 533, per Lord Denman; 535, per Parke, J.; Heston *v.* St. Bride, 22 L. J., M. C., 65; 1 E. & B. 583, S. C.

[6] R. *v.* St. Pancras, 1 Pea. R. 220, 221; R. *v.* Haughton, 1 E. & B. 501, 514; R. *v.* Nether Hallam, 6 Cox, C. C. 435.

mation in rem in the Exchequer will be conclusive proof of the illegality of the seizure as against strangers, in the same way as a judgment of condemnation is conclusive in favour of its legality, may admit of some doubt. Lord Kenyon on one occasion seems to have considered that it was conclusive,[1] but the point has never been expressly determined; and as an acquittal does not, like a conviction, ascertain any precise fact, but may be occasioned by the laches of the prosecutor, it certainly seems reasonable to contend that strangers should not be conclusively bound thereby.[2]

§ 1532. In Day *v.* Spread,[3] an action was brought in Ireland for necessaries supplied to the defendant's wife, while living separate from her husband. In support of the plaintiff's claim witnesses were called to prove that the separation was justifiable on the wife's part, as it was owing to the cruel and violent treatment of her husband. In order to rebut this case, and also to prove that the wife had been guilty of adultery, the defendant tendered in evidence a sentence of the Ecclesiastical Court, *dismissing* a suit instituted by the wife against her husband for a divorce on account of cruelty, in which suit the husband had made a counter allegation of adultery. The majority of the judges held, that this evidence was admissible, though Mr. Justice Perrin, in an able judgment, advanced a contrary opinion; but the whole Court considered, that, if received at all' it was entitled to very little weight; whereas, had the Ecclesiastical Court divorced the parties, its sentence would, doubtless, have been conclusive in favour of the plaintiff.

§ 1533. With regard to *foreign judgments*,—which term includes judgments, decrees, and other adjudications, whether strictly of record or not, emanating from Irish, Scotch, colonial, or foreign tribunals,[4]—their *admissibility and effect* in English courts will be

[1] Cooke *v.* Sholl, 5 T. R. 256. [2] B. N. P. 245; 2 Ph. Ev. 38, 39.

[3] Jebb & Bourke, 163.

[4] Houlditch *v.* M. of Donegal, 8 Bligh, N. R. 337, 338, per Ld. Brougham; 2 Cl. & Fin. 476, 477, S. C.; Ferguson *v.* Mahon, 11 A. & E. 179; 3 P. & D. 143, S. C.; Harris *v.* Saunders, 4 B. & C. 411; 6 D. & R. 471, S. C., as to Irish judgments; Cowan *v.* Braidwood, 1 M. & Gr. 882; 2 Scott,

found to depend on rules, which in many respects are similar to those that apply to home judgments. For instance, they are always admissible, whether for or against strangers or parties, in proof of their existence;[1]—they are divisible into judgments in rem and judgments inter partes, the former being evidence of the facts adjudicated as against all the world, the latter being only admissible for and against parties and privies;[2]—they furnish no evidence whatever of matters collaterally or incidentally noticed in them, still less of matters to be inferred by argument from them;[3]—they must, in order to be received, finally determine the points in dispute, and be adjudications upon the actual merits;[4]—and they are open to be impeached on the ground, either of fraud or collusion,[5] or of want of jurisdiction, whether over the cause, over the subject-matter, or over the parties.[6]

§ 1534. The subject of *jurisdiction* deserves further notice; and here it may first be observed, that the courts of this country will so far presume that a foreign tribunal has acted within the limits of its authority, and that its proceedings are regular, that, if an action be brought upon a foreign judgment, the plaintiff need not allege in his declaration, either that the foreign court had jurisdiction over the parties or the cause,[7] or that the proceedings had been properly conducted.[8] It seems, however, to be still

N. R. 138, S. C.; Russell v. Smyth, 9 M. & W. 810, as to Scotch judgments; Henderson v. Henderson, 6 Q. B. 288; 11 Q. B. 1015, S. C.; as to colonial decrees. [1] Tarleton v. Tarleton, 4 M. & Sel. 20; ante, § 1480.

[2] Ante, § 1486. [3] Ante, § 1520.

[4] Plummer v. Woodburne, 4 B. & C. 625; 7 D. & R. 25, S. C.; Smith v. Nicolls, 5 Bing. N. C. 222, per Tindal, C. J.; Sadler v. Robins, 1 Camp. 253; Garcias v. Ricardo, 14 Sim. 265; Ricardo v. Garcias, 12 Cl. & Fin. 368.

[5] Price v. Dewhurst, 8 Sim. 302—309, per Shadwell, V. C.; 4 Myl. & Cr. 85, per Lord Cottenham, S. C., on appeal; Don v. Lippmann, 5 Cl. & Fin. 20, per Lord Brougham; Magoun v. N. Engl. Ins. Co., 1 Story, R. 157; Bradstreet v. Neptune Ins. Co., 3 Sumner, 600.

[6] Price v. Dewhurst, 4 Myl. & Cr. 85, per Lord Cottenham; Rose v. Himely, 4 Cranch, 269, 270, per Marshall, C. J.

[7] Robertson v. Struth, 5 Q. B. 941.

[8] Cowan v. Braidwood, 1 M. & Gr. 882, 892, 895, per Maule J.; 2 Scott, N. R. 138, S. C.

necessary for a defendant to state these particulars, when he pleads such judgment by way of estoppel or of justification.[1] Next, although it will scarcely be expected in a work like the present, that all the cases should be noticed, in which foreign judgments have been rejected as having emanated from a court having no jurisdiction, it may be useful to refer to a few leading decisions on the subject. Thus, sentences of foreign *prize* courts have repeatedly been held invalid by English judges, as being pronounced by a court having no jurisdiction, when it appeared that the court had sate in a neutral country under a commission from a belligerent power;[2] and for this purpose a country has been considered neutral, where its independence was in form only preserved, the belligerent having poured into it such a body of troops, as in reality to possess the sovereign authority.[3]

§ 1535. Again, it is decided that no foreign court has power to annul a *marriage* solemnised in England between English subjects;[4] at least, if, at the date of the divorce à vinculo, the parties were not bonâ fide domiciled in the foreign state.[5] But if parties, domiciled in Scotland, be married in England, they may legally be divorced by a Scotch court, though it be still a vexata quæstio, whether such divorce would be recognised as valid in England.[6] Whether the judgment of a foreign country on the validity of a marriage, which has been celebrated, either within its territories between parties who are not subjects of that country,

[1] Collett *v.* Lord Keith, 2 East, 260; Gen. Steam Navig. Co. *v.* Guillou, 11 M. & W. 877, 894. See Ricardo *v.* Garcias, 12 Cl. & Fin. 377, 378, 381.

[2] The Flad Oyen, 8 T. R. 270, n. by Sir William Scott; Havelock *v.* Rockwood, 8 T. R. 276. These cases virtually overrule a doubt thrown out by Lord Kenyon in Smith *v.* Surridge, 4 Esp. 26, 27.

[3] Donaldson *v.* Thompson, 1 Camp. 429, per Lord Ellenborough.

[4] R. *v.* Lolley, R. & R. 237; Tovey *v.* Lindsay, 1 Dow, R. 117; M'Carthy *v.* De Caix, 2 Russ. & Myl. 614; 3 Hagg. Ecc. R. 642, n.; 2 Cl. & Fin. 568, n., S. C.

[5] Conway *v.* Beazley, 3 Hagg. Ecc. R. 639, 645—647, 653, per Dr. Lushington; Dorsey *v.* Dorsey, 7 Watts, 350, per Gibson, C. J.; 1 Chand. Law Rep. 287, 289; Story Confl. of Laws, § 230 a.

[6] Warrender *v.* Warrender, 9 Bligh, 89; 2 Cl. & Fin. 488, 540, 541, 558, S. C. See Geils *v.* Geils, 1 Macq. Sc. Cas. H. of L. 255.

or beyond its territories between parties, one or both of whom are natives of some other foreign state, would be binding upon our courts, is also an undetermined and difficult question, which depends upon principles of international law respecting jurisdiction, that are not yet definitively settled.[1] On principle, however, it seems clear, that such a judgment should be either wholly inadmissible, or conclusive, in our courts, according as it should appear to have been pronounced by a tribunal not having, or having, jurisdiction over the subject-matter. And the same doctrine would equally apply to judgments of divorce pronounced by the court of a foreign country, when the marriage had not been celebrated, and the parties were not domiciled, in that country.[2]

§ 1536. With respect to judgments inter partes, a doubt has been entertained as to whether a foreign court could exercise any jurisdiction over *real property* situate in another country. It clearly cannot do so *immediately*, because its judgment cannot directly bind the land;[3] and, consequently, where the Court of Chancery in Ireland, after verdict upon an issue devisavit vel non, had decreed that the instrument set up as a will was not an operative devise of certain Irish estates, it was held that this decree could not be pleaded in bar to a suit between the same parties in the Court of Chancery in England, which had been instituted by the devisee for the purpose of establishing the will, so far as it related to some English property.[4] Still, a foreign court may, as it seems, *indirectly* affect land in this country by acting in personam, that is, through the medium of its power over the person entitled to the property; and therefore, if an Irish, colonial, or other foreign court of equity were, by a valid decree, to appoint a receiver in this country, the party, on whose behalf the appointment was made, might probably, by filing a bill in the English Court of Chancery, get his foreign decree carried

[1] Sinclair *v.* Sinclair, 1 Hagg. Cons. R. 297, per Lord Stowell. See Connelly *v.* Connelly, 2 Roberts. Ec. R. 201.

[2] See Story Confl. of Laws, § 203, et seq.

[3] Burnham *v.* Webster, 1 Woodb. & Min. 176.

[4] Boyse *v.* Colclough, 1 Kay & J. 124, per Wood, V. C.

into execution. At least the converse of the above rule was, a few years back, solemnly decided in the House of Lords.[1]

§ 1537. Questions of jurisdiction have also frequently arisen, where the party, seeking to avoid the effect of a foreign judgment, has pleaded, with more or less particularity, that he was not, at the time of the proceedings against him, either resident within the territories of the foreign State, or the subject of such state; and here the rules, as far as they can be collected from the cases, appear to be these; first, that the plea must contain every allegation which is necessary to render the judgment invalid, and must, in short, be good *in omnibus*;[2] and next, that among the necessary allegations must be included averments, that the defendant was not a subject of the foreign state, or resident, or even present, in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicil, or temporary presence, by the decision of its courts;[3] and further, that he was not the owner of real property in such state, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent.[4] Moreover, it will generally be advisable, if not necessary, to add, that the defendant has had no notice or knowledge of the proceedings.[5]

§ 1538. Besides the rules already stated,[6] which are common to foreign and domestic judgments, others may be cited, which, if not exclusively applicable to foreign adjudications, are at least

[1] Houlditch *v.* Donegal, 8 Bligh, N. R. 301, 343—345, per Lord Brougham; 2 Cl. & Fin. 470, 479—481; Lloyd & G., Rep. temp. Sugden, 82, S. C.

[2] Cowan *v.* Braidwood, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; Becquet *v.* MacCarthy, 2 B. & Ad. 951; explained in Don *v.* Lippmann, 5 Cl. & Fin. 21, per Lord Brougham.

[3] Gen. Steam Navig. Co. *v.* Guillou, 11 M. & W. 894; Cowan *v.* Braidwood, 1 M. & Gr. 892, 893, per Tindal, C. J.; Russell *v.* Smyth, 9 M. & W. 810; Reynolds *v.* Fenton, 3 Com. B. 187.

[4] Cowan *v.* Braidwood, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; Douglas *v.* Forest, 4 Bing. 686, 701—703; 1 M. & P. 663, S. C.

[5] Cowan *v.* Braidwood, 1 M. & Gr. 893.

[6] Ante, § 1533.

far more frequently applied to them than to the decisions of our own courts. For instance, if it be apparent upon the face of the proceedings, or can be made so by extrinsic proof, that a foreign judgment is contrary to the law of nations,[1] or is repugnant to natural justice,[2] or is founded on a mistaken notion of the English law,[3] or is obviously opposed to the law of the country where it was pronounced,[4] or is so grossly defective, as to render it doubtful what point, if any, was actually determined,[5] or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision,[6] its effect as evidence will be wholly neutralised.

§ 1539. In stating that foreign judgments, when *repugnant to natural justice*, will be disregarded in English courts, vague language is undoubtedly used; and it may be thought by some, that the frequent allusion to this rule by our judges savours slightly of a Chinese contempt for "outside barbarians." Still, it cannot be denied that the rule, in some cases, has been productive of much good; as for instance, in Price *v.* Dewhurst,[7] where a judgment pronounced in the Danish island of St. Croix was disregarded in our courts, it appearing that one of the litigating parties had himself acted as the judge, and had decided the question in dispute in his own favour. So, it has several times been held, both in England and America, that a defendant may defeat the effect of a foreign judgment by pleading and

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[1] Baring *v.* Clagett, 3 B. & P. 215, per Lord Alvanley; Wolff *v.* Oxholm, 6 M. & Sel. 92.

[2] Ferguson *v.* Mahon, 11 A. & E. 181, per Lord Denman, citing Becquet *v.* MacCarthy, 2 B. & Ad. 951; Henderson *v.* Henderson, 6 Q. B. 298, per Lord Denman; Buchanan *v.* Rucker, 1 Camp. 63, per Lord Ellenborough; 9 East, 192, S. C.; Cowan *v.* Braidwood, 1 M. & Gr. 895, per Maule, J.; Sims *v.* Thomas, 3 Ir. Law R. 417, per Brady, C. J.

[3] Novelli *v.* Rossi, 2 B. & Ad. 757; S. C. more full, 9 L. J., K. B., 307.

[4] Sims *v.* Thomas, 3 Ir. Law R. 415.

[5] Obicini *v.* Bligh, 8 Bing. 335; 1 M. & Scott, 477, S. C.

[6] Calvert *v.* Bovill, 7 T. R. 523; Pollard *v.* Bell, 8 T. R. 434; Reimers *v.* Druce, 26 L. J., Ch., 196, 199, per Romilly, M. R.; 23 Beav. 145, 150, 154, S. C.

[7] 8 Sim. 279, 305, 306; 4 Myl. & Cr. 76, 85, S. C. See Grand Junct. Can. Co. *v.* Dimes, 12 Beav. 63; 2 Hall & T. 92; 2 M. & Gord. 285, S. C.

proving, that in the court from which it proceeded no suit can be instituted without issuing process, and yet that he was never arrested, or served with, or had notice or knowledge of, any process at the suit of the plaintiff for the cause of action upon which the judgment was recovered, and that he had never appeared thereto; for the common justice of all nations requires, that no condemnation should be pronounced behind the back of a man, who has had no opportunity to appear and defend his interest, either personally, or by his proper representatives.[1]

§ 1540. The defendant, however, in framing such a plea, must carefully negative every state of facts on which the judgment can be supported; and therefore, if he merely deny that he has had notice of any *process*, and do not allege, that without process the suit in the foreign court would be a nullity, his plea will be bad on general demurrer; unless, perhaps, in the event of its containing a distinct averment, that the defendant has had no notice or knowledge whatever of the *suit*.[2] In Ferguson *v.* Mahon,[3] the plea, indeed, was held good, though it merely denied a notice of process; but that case, which was an action on an Irish judgment, can only be sustained, if at all,[4] on the ground, that an English court will judicially

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[1] Ferguson *v.* Mahon, 11 A. & E. 179; 3 P. & D. 143, S. C.; Buchanan *v.* Rucker, 1 Camp. 63; 9 East, 192, S. C.; Cavan *v.* Stewart, 1 Stark. R. 525; Houlditch *v.* Donegal, 8 Bligh, N. R. 338, 339, per Lord Brougham; Vallée *v.* Dumerque, 4 Ex. R. 290; Story Confl. of Laws, § 592; Sawyer *v.* Maine Fire & Mar. Ins. Co., 12 Mass. 291; Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600; Magoun *v.* New Engl. Ins. Co., 1 Story, R. 157; Rangely *v.* Webster, 11 N. Hamps. R. 299, recognised in Burnham *v.* Webster, 1 Woodb. & Min. 178. In Dr. Bentley's case, Fost. 202; 1 Stra. 557; Andr. 176; 2 Lord Raym. 1334, S. C., Mr. Justice Foster refers to a very old precedent in support of this doctrine. "I have heard it observed by a very learned man," says he, "that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." The above passage was cited with approbation by Maule, J., in Abley *v.* Dale, 10 Com. B. 71, 72.

[2] Reynolds *v.* Fenton, 3 Com. B. 187; Sheehy *v.* The Professional Life Assurance Co., 13 Com. B. 787.

[3] 11 A. & E. 179; 3 P. & D. 143, S. C.

[4] Sheehy *v.* The Professional Life Assurance Co., 13 Com. B. 787.

recognise the fact, that an action must be commenced by process in Ireland.[1] Other cases connected with this subject have already been referred to, while treating of the want of jurisdiction.[2]

§ 1541. The most difficult point connected with foreign judgments is, to determine when they are *conclusive*, and when they are merely *primâ facie* evidence of the facts adjudicated by them; and here it will be convenient to consider the subject as it relates, first, to judgments in rem; next, to judgments inter partes, when they are set up by way of defence to a suit in a domestic tribunal; and lastly, to such judgments, when they are sought to be enforced in our own courts against the original defendant, or his estate.

§ 1542. And first, as to *foreign judgments in rem.* The most important of these are the sentences of condemnation by foreign Courts of Admiralty on questions of *prize;* and here, although Lord Thurlow and Lord Ellenborough were wont to say that the practice of receiving them at all in evidence rested upon an overstrained comity, and was often productive of cruel injustice,[3] it is now too late to dispute the rule, that, provided such sentences are not impeachable upon some one of the grounds before stated,[4] they will be conclusive against all persons, and in all countries, as to the fact upon which the condemnation proceeded, where such fact is stated on the face of the sentence, free from ambiguity.[5] At the same time it seems equally clear, that the ground of condemnation may still be contested in an English court of law, when the language of the sentence, by setting out several reasons for the judgment, leaves it uncertain whether the ship was condemned upon a ground, which would warrant its condemnation by the law of nations, or upon another ground, which amounts only

[1] Reynolds *v.* Fenton, 3 Com. B. 191, per Maule, J.
[2] Ante, §§ 1534, 1537.
[3] Fisher *v.* Ogle, 1 Camp. 419, 420; Donaldson *v.* Thompson, id. 432.
[4] Ante, §§ 1533, 1534, 1538.
[5] Dalgleish *v.* Hodgson, 7 Bing. 504, per Tindal, C. J.; Bolton *v.* Gladstone, 5 East, 160, per Lord Ellenborough; Lothian *v.* Henderson, 3 B. & P. 499, 517, per Le Blanc, J.; Kindersley *v.* Chase, 2 Park, Ins. 743—752.

to a breach of the municipal regulations of the condemning country.[1]

§ 1543. Whether a sentence, which, without stating any ground of decision, should condemn a vessel as lawful prize, would be conclusively presumed to have been pronounced on some just ground, is a question of doubt. Lord Mansfield, and several other eminent judges of the last century, entertained an opinion in favour of its conclusive character;[2] but this doctrine has since been much shaken; and in a case of some importance Chief Justice Tindal has not hesitated to declare, that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by *inference* only.[3] Perhaps, the safest rule on the subject would amount to no more than this; that if, in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show, that in fact the judgment had proceeded upon some ground other than that of an infraction of neutrality;[4] although in the absence of such proof, the court would certainly feel bound to pronounce, that the ship was condemned as enemies' property.[5]

§ 1544. Another important class of foreign judgments in rem consists of sentences concerning *marriage*, and sentences of

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[1] Dalgleish v. Hodgson, 7 Bing. 495, 504; 5 M. & P. 407, S. C.; Bernardi v. Motteux, 2 Doug. 575; Calvert v. Bovill, 7 T. R. 523; Baring v. Clagett, 3 B. & P. 215.

[2] Saloucci v. Woodmass, 2 Park Ins. 727, per Lord Mansfield; recognised by Lord Alvanley in Baring v. Clagett, 3 B. & P. 215; and by Lawrence, J., in Lothian v. Henderson, 3 B. & P. 527; Pollard v. Bell, 8 T. R. 438, per Grose, J.; 444, per Le Blanc, J.

[3] Dalgleish v. Hodgson, 7 Bing. 504; Fisher v. Ogle, 1 Camp. 418, per Lord Ellenborough.

[4] Calvert v. Bovill, 7 T. R. 527, per Lawrence, J.

[5] For American authorities respecting proceedings in rem in foreign courts of Admiralty, see Croudson v. Leonard, 4 Cranch, 434; Williams v. Armroyd, 7 Cranch, 423; Hudson v. Guestier, 4 Cranch, 293; The Mary, 9 Cranch, 126, 142—146; Bradstreet v. Neptune Ins. Co., 3 Sumner, 600; Grant v. M'Lachlin, 4 Johns. 34; Burnham v. Webster, 1 Woodb. & Min. 176.

divorce.[1] These, when pronounced in the country where the marriage was solemnised, and the parties are domiciled, will be regarded in the courts of England as conclusive of the facts adjudicated, unless they be open to some of the objections before stated;[2] for otherwise, as Lord Hardwicke once observed, "the rights of mankind would be very precarious."[3]

§ 1545. Foreign jurists strongly contend, that a similar doctrine should prevail in favour of all judgments in rem; and, consequently, that the decree of a foreign court, declaring the status of a person, and placing him, as an idiot, or a minor, or a prodigal, under *guardianship*, should be deemed of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the territories of the sovereign whose tribunal pronounced the sentence. But, in this country; as also in America, the rights and powers of *guardians* are considered as strictly local; and no guardian is here admitted to have any right to receive the profits, or to assume the possession, of the real estate of his ward, or to control his person, or to maintain any action for his personalty, without having received a due appointment from the proper English authority.[4]

§ 1546. The decisions of foreign courts of *bankruptcy* and *insolvency* may be placed in the same category with decrees appointing guardians; and, therefore, although the discharge of a debtor under the bankrupt or insolvent laws of a foreign State will so far be recognised in this country, that it will be held of

[1] The whole subject of foreign divorce is ably discussed by Mr. Justice Story in his Confl. of Laws, §§ 200—230 b.

[2] Ante, §§ 1533, 1534, 1538.

[3] Roach *v.* Garvan, 1 Ves. Sen. 159; Ex parte Cottington, 2 Swanst. 326, n.; S. C., cited in Boucher *v.* Lawson, Cas. temp. Hardw. 9; Sinclair *v.* Sinclair, 1 Hagg. Consis. R. 297.

[4] Dawson *v.* Jay, 2 Sm. & Gif. 199; Ex parte Watkins, 2 Ves. Sen. 470 a; Story Confl. of Laws, §§ 499, 504, 504 a, 594; Morrell *v.* Dickey, 1 Johns. Ch. R. 153; Kraft *v.* Wickey, 4 Gill & Johns. 332, 340, 341. See, however, Scott *v.* Bentley, 24 L. J., Ch., 244, where Wood, V. C., held, that a curator bonis of a lunatic's estate appointed by a Scotch court might sue in England for debts due to the lunatic.

binding authority with respect to all contracts made in such state, it cannot be here pleaded in bar to any action, which is brought on a contract made or to be performed elsewhere.[1]

§ 1547. The same rule is also applied to the case of *executors* and *administrators;* and it is now clearly established that, in order to sue or be sued in any court of England, whether of law or equity, in respect of the personal rights or property of a testator or intestate, the plaintiff,[2] or defendant,[3] as the case may be, must appear to have obtained a probate, or letters of administration, in the proper court of this country. A foreign probate or letters, granted by the court of the country where the property is found, may perhaps be brought under the notice of the English Court of Probate, with the view of inducing that tribunal to clothe the foreign executor or administrator with proper English powers;[4] but until he be so clothed, he cannot sue in this country; and when he is so clothed, he may sue without showing, in addition to his English title, that any probate or letters have been granted to him by the foreign court.[5] If, indeed, an executor or administrator under a valid foreign probate or grant, has received a debt due to the deceased in the foreign country, and given a release for it, this will be a bar to any demand against the debtor on the part of an executor or administrator appointed in England; and to this extent, and for this purpose, the English tribunals will recognise and give effect to foreign probates and grants.[6]

§ 1548. Next, as to foreign *judgments inter partes*, when they

[1] Towne *v.* Smith, 1 Woodb. & Min. 115, where this question is very fully discussed by Woodbury, J.

[2] Whyte *v.* Rose, 3 Q. B. 507, per Tindal, C. J., pronouncing the judgment of the Exchequer Chamber; Spratt *v.* Harris, 4 Hagg. Eccl. R. 405; Price *v.* Dewhurst, 4 Myl. & Cr. 80—82, per Lord Cottenham; Lasseur *v.* Tyrconnel, 10 Beav. 28. But see M'Mahon *v.* Rawlings, 16 Sim. 429.

[3] Silver *v.* Stein, 21 L. J., Ch., 312, per Kindersley, V. C.

[4] Price *v.* Dewhurst, 4 Myl. & Cr. 84.

[5] Whyte *v.* Rose, 3 Q. B. 493, 507, 508; Carter & Crost's case, Godb. 33.

[6] Danyel *v.* ——, Dalison, 76; S. C., as Daniel *v.* Luker, 3 Dyer, 305 a, pl. 58; recognised and explained in Whyte *v.* Rose, 3 Q. B. 510.

are set up by way of *defence* to an action or suit in a domestic court. Such a judgment, when pronounced *adversely* to the party who brings the second action, will be conclusively binding upon him, provided it be properly pleaded by way of estoppel.[1] But the plea requires to be carefully drawn; for, although it need not set forth the proceedings and judgment at length,[2] nor does it require, as formerly was the case,[3] any formal commencement or conclusion;[4] yet if it contain no averment that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country, by reason of allegiance, domicil, or temporary presence;[5] or that the foreign court had jurisdiction over the subject-matter of the suit; or that, by the law of the foreign country, the judgment recovered was an absolute bar to a fresh action;[6] or that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit;[7]—in any of these cases, the plea will be exposed to the risk of being held bad on demurrer. If, too, the defendant, instead of pleading the judgment, contents himself with putting it in evidence, it will then, like a domestic judgment under similar circumstances, be merely cogent but not conclusive evidence in his behalf.[8]

§ 1549. But now, let it be assumed, that the foreign judgment was pronounced *in favour* of the party who brings the second suit. Can the defendant avail himself of such judgment as a defence, where the plaintiff has declared on the original cause of action? Clearly he cannot, because the nature of the debt or

[1] Philips *v.* Hunter, 2 H. Bl. 410, per Eyre, C. J.; Plummer *v.* Woodburne, 4 B. & C. 625; 7 D. & R. 25, S. C.; Ricardo *v.* Garcias, 12 Cl. & Fin. 368.

[2] Ricardo *v.* Garcias, 12 Cl. & Fin. 638.

[3] Gen. Steam Navig. Co. *v.* Guillou, 11 M. & W. 877, 894.

[4] 15 & 16 Vict., c. 76, § 66, enacts, that "in a plea or subsequent pleading it shall not be necessary to use any allegation of actionem non, or actionem alterius non, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication or subsequent pleading, to use any allegation of precludi non, or to the like effect, or any prayer of judgment."

[5] Gen. Steam Navig. Co. *v.* Guillou, 11 M. & W. 877, 894.

[6] Plummer *v.* Woodburne, 4 B. & C. 625; 7 D. & R. 25, S. C.

[7] Ricardo *v.* Garcias, 12 Cl. & Fin. 368.

[8] Ante, §§ 78, 1486.

damage sought to be recovered has not been changed; the plaintiff has no higher remedy in consequence of the foreign judgment, and he cannot issue immediate execution upon it in this country, but can only enforce it by bringing a fresh action on contract.[1] If, indeed, the foreign judgment has not only been recovered, but has had satisfaction entered up, it would then, as it seems, be conclusive in favour of the defendant, if pleaded by way of estoppel; but this point has never yet been expressly determined. It may here be added, that if a man has been tried and acquitted in a foreign country by a court having competent jurisdiction, he may plead and prove such acquittal in bar of any indictment preferred against him in this country for the same offence.[2]

§ 1550. When a foreign judgment inter partes is *sought to be enforced by an action or suit* in a domestic tribunal, it matters not whether it has emanated from a court of record, or not of record, from a superior or inferior court, from a court of common law, and from one exercising equitable jurisdiction; but in all cases alike, provided a clear balance has been ascertained, and a final[3] decision on the merits has been bonâ fide pronounced by a tribunal of competent authority, the successful party may maintain an action on contract in any of our superior courts of common law for the recovery of the amount so decided to be due to him.[4] Even costs awarded by a decreet of the Court of Session in Scotland in a suit for a divorce, have been recovered by an action at law brought against the defendant while resident in this country;[5] and in conformity with this decision, it seems that

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[1] Smith *v.* Nicolls, 5 Bing. N. C. 208, 220, 221; 7 Scott, 147, S. C.; Wilson *v.* Lady Dunsany, 18 Beav. 293.

[2] R. *v.* Roche, 1 Lea. C. C. 134; B. N. P. 245.

[3] If the decree or judgment be not final, the action upon it is not maintainable, Patrick *v.* Shedden, 2 E. & B. 14; Paul *v.* Roy, 21 L. J., Ch., 361; 15 Beav. 433, S. C.

[4] Henderson *v.* Henderson, 6 Q. B. 288; Sadler *v.* Robins, 1 Camp. 255, 256, per Lord Ellenborough; Henley *v.* Soper, 8 B. & C. 16; 2 M. & R. 153, S. C., as to decrees of colonial courts of equity; Harris *v.* Saunders, 4 B. & C. 411; 6 D. & R. 471, S. C., as to a judgment of one of the superior courts in Ireland; Arnott *v.* Redfern, 3 Bing. 353, as to a judgment of a Court of Admiralty in Scotland.

[5] Russell *v.* Smyth, 9 M. & W. 810.

were litigation to arise in France relating to real property, and were costs to be given against a party who should afterwards come to this country, an action for such costs might here be maintained.[1] The decrees of foreign courts of equity, might, indeed, in some instances, not be enforceable in our courts of law, because they might involve collateral and provisional matters, to which a court of law could give no effect; but even then, the English Court of Chancery would entertain a bill founded on such a foreign decree, for the purpose of giving effect to it in regard to English property.[2]

§ 1551. It is admitted on all sides that, in these actions and suits, the foreign judgments are *primâ facie evidence* in support of the plaintiff's claim, and are to be deemed right until the contrary is established.[3] But the question still remains, are such judgments to be deemed *conclusive*, or can the defendant, by going at large into the *original merits*, dispute the propriety of the decisions? The arguments on either side of this vexed question are well put by Mr. Smith in his admirable note on the Duchess of Kingston's case. "Now, upon one side it is said, that the tribunals of this country are not *bound* to enforce the judgments of a foreign court; that when they do so, it is *de gratiâ*, and from a wish to extend the limits of justice—*ampliare justitiam*. But that it would be to amplify injustice, not justice, were they to enforce a sentence which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force, that invariable experience shows, that facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them; that if our courts were to allow matters judicially decided upon to

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[1] Russell *v.* Smyth, 9 M. & W. 818, per Lord Abinger.

[2] Henderson *v.* Henderson, 6 Q. B. 297, per Lord Denman; Houlditch *v.* M. of Donegal, 8 Bligh, N. S. 301; 2 Cl. & Fin. 470; Lloyd & G., Rep. temp. Sugden, 82, S. C.

[3] Sinclair *v.* Fraser, per Dom. Proc., cited in 20 How. St. Tr. 468, 469, and in 1 Doug. 4, n.; recognised in Arnott *v.* Redfern, 3 Bing. 357, and in Robertson *v.* Struth, 5 Q. B. 943, 944; Cowan *v.* Braidwood, 1 M. & Gr. 892, 895, per Maule, J.

be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it, and that injustice and mistakes, instead of being amended, would be generated."[1]

§ 1552. Mr. Justice Story, too, in his Conflict of Laws, makes the following forcible observations in support of the conclusiveness of foreign judgments. "It is, indeed," says he, "very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the Court upon the whole evidence, may have been decidedly in favour of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? Or is the Court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the Court to open the judgment, and to proceed ex æquo et bono? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule, that the judgment is to be primâ facie evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for, under

[1] 2 Smith's Lead. Cas. 449, 450.

such circumstances, it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original justice of the judgment, by showing that the Court had no jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by the local law Fori rei judicatæ. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits."[1]

§ 1553. In accordance with these views, it has several times been held by the Court of Queen's Bench, that no inquiry can be instituted into the merits of the original action, or the propriety of the decision; and that the defendant is not at liberty to raise any objection, which would have constituted a defence in the foreign court, and which, consequently, should there have been pleaded and finally disposed of.[2] The same doctrine, too, has been advanced with more or less confidence, by Lord Nottingham,[3] Lord Kenyon,[4] Lord Ellenborough,[5] Sir L. Shadwell,[6] Lord Wensleydale,[7] and the Court of Exchequer in Ireland.[8] On the other hand, Lord Hardwicke,[9] Lord Mansfield,[10] Chief Baron Eyre,[11] Mr. Justice Buller,[12] Mr. Justice Bayley,[13] and especially Lord Brougham,[14] have strenuously contended that foreign judgments,

[1] Story Confl. of Laws, § 607. See also Bk. of Australasia v. Nias, 16 Q. B. 735—737, per Lord Campbell.

[2] Henderson v. Henderson, 6 Q. B. 288, 298, 299; Ferguson v. Mahon, 11 A. & E. 179, 183; 3 P. & D. 143, S. C.; Bk. of Australasia v. Nias, 16 Q. B. 717.

[3] Gold v. Canham, cited in note to Kennedy v. Cassillis, 2 Swanst. 325.

[4] Galbraith v. Neville, 1 Doug. 6, n.

[5] Tarleton v. Tarleton, 4 M. & Sel. 22. [6] Martin v. Nicolls, 3 Sim. 458.

[7] Citing Martin v. Nicolls, in Becquet v. MacCarthy, 2 B. & Ad. 954.

[8] Sims v. Thomas, 3 Ir. Law R. 415.

[9] Isquierdo v. Forbes, cited by Lord Mansfield, in 1 Doug. 6.

[10] Walker v. Witter, 1 Doug. 1. [11] Philips v. Hunter, 2 H. Bl. 410.

[12] Galbraith v. Neville, 1 Doug. 6, n.; Messin v. Lord Massareene, 4 T. R. 493. [13] Tarleton v. Tarleton, 4 M. & Sel. 23.

[14] Houlditch v. M. of Donegal, 8 Bligh, N. S. 301, 337—342; 2 Cl. & Fin. 470, 477—479, S. C.; Don v. Lippmann, 5 Cl. & Fin. 1, 20—22.

when actions are brought upon them, are merely primâ facie evidence on behalf of the plaintiff; and this rule also prevails in America, though the extent to which it should be carried is certainly not yet definitively settled in that country.[1] On the whole it seems,—if an opinion may be expressed on a subject respecting which so much doubt prevails,—that the arguments, if not the authorities, in support of the conclusiveness of foreign judgments, preponderate over those in favour of a contrary doctrine.

§ 1554. But, however this precise point may be ultimately determined, it appears to be acknowledged law both in England and America,[2] that, when a foreign judgment, instead of being itself the consideration of the promise declared on, merely comes *incidentally* or *collaterally* in question, it cannot be disputed. Thus, in Tarleton *v.* Tarleton,[3] the plaintiff and defendant had been partners, and the latter, on the dissolution of the partnership, had covenanted to indemnify the former against the debts of the late firm. In an action on that covenant, the plaintiff, in order to prove the damnification, put in a judgment recovered in a foreign court by a creditor of the firm against himself and the defendant, in consequence of which his property had been seized; and the Court held, that the defendant was not at liberty to show that the proceedings were erroneous.

§ 1555. Another rule connected with this subject has already been referred to as equally clear,[4] and that is, that a foreign judgment does not occasion a *merger* of the original cause of action; and, therefore, when it becomes necessary to enforce the plaintff's demand in this country, he may either resort to such original cause, or bring an action on contract upon the judgment.[5]

[1] Story Confl. of Laws, § 608, and cases there cited; Burnham *v.* Webster, 1 Woodb. & Min. 172.

[2] See cases cited in Cowen's notes to 1 Ph. Ev. 353, Am. Ed.

[3] 4 M. & Sel. 20; recognised by Lord Brougham in Houlditch *v.* Donegal, 8 Bligh, N. S. 341; 2 Cl. & Fin. 478, S. C.

[4] Ante, § 1549.

[5] Hall *v.* Odber, 11 East, 118, 126, 127, per Bayley, J.; Smith *v.* Nicolls, 5 Bing. N. C. 221, 222, per Tindal, C. J.; Bk. of Australasia *v.*

In the event of his adopting the former of these courses, it seems that the defendant may still, notwithstanding the production of the judgment, dispute the plaintiff's demand; for, it may well be contended, that, by this mode of declaring, the plaintiff has himself courted a reinvestigation of the merits.[1]

§ 1556. Having now stated the general rules which govern the admissibility and effect of domestic and foreign judgments, it remains to point out one or two statutes, by which the receipt in evidence of the adjudications and proceedings of particular tribunals is regulated. And first, as to the adjudications and other proceedings in *Courts of Bankruptcy.* It has been shown that these may be proved either by producing the originals duly sealed, or by office and sealed copies;[2] but the question still remains, what is their *effect* when proved? and here it must be borne in mind, that an adjudication of bankruptcy, unlike a judgment in rem,[3] is *no evidence of the facts on which it is founded;* and therefore, the assignees, notwithstanding such adjudication, would, in any action or suit brought by or against themselves, be forced to prove at common law *the trading,* the *petitioning creditor's debt,* and the *act of bankruptcy,* since the adjudication of bankruptcy and their consequent appointment as assignees, would be merely evidence to complete their title, when these preliminary matters had first been established. The inconvenience, however, of requiring this proof to be reiterated on every fresh action or suit, has been found so great, that the Legislature has interposed, and has very sensibly enacted, first, that in all cases as against the bankrupt, and in all actions and suits brought by the assignees for any debt or demand for which the bankrupt might have sustained an action or suit, had he not been adjudged bankrupt,— the Gazette containing the advertisement of the adjudication shall, unless the bankrupt has within a certain prescribed period taken steps to annul such adjudication, be conclusive evidence of the fact of bankruptcy, and of the date of the filing of the

Harding, 19, L. J., C. P., 345; 9 Com. B. 661, S. C.; Kelsall *v.* Marshall, 26 L. J., C. P., 19; 1 Com. B., N. S., 241, S. C.

[1] See 2 Smith's Lead. Cas. 448.

[2] Ante, § 1392.

[3] Ante, § 1486.

petition.[1] Notwithstanding the very general language employed in the above enactment, doubts may be entertained whether it would be held applicable to a case where a bankrupt was indicted for an offence against the Bankruptcy Law;[2] but be this as it may, thus much is clear, that, in such a case, proof of the adjudication alone would not suffice to establish the ingredients of the bankruptcy, and that a certified copy of the petition of adjudication, though admissible in evidence under § 239 of the statute, would furnish no proof of the date on which the petition was filed.[3]

§ 1556 A. Secondly, the Bankruptcy Law Consolidation Act enacts, that,—except in the cases mentioned in the last section,—no proof of the petitioning creditor's debt, the trading, or the act of bankruptcy, shall be required in any action by or against the assignees, or against any person acting under the warrant of the Court, unless a written *notice* of an *intention to dispute* any or all of such matters has been given to the assignees or other person; and then, in order to check the service of these notices, the Court is empowered to allow the assignees or other person costs in the event of the facts disputed being proved.[4]

[1] 12 & 13 Vict., c. 106, § 233, cited ante, p. 1330, n. 7. See also as to the Irish law, 20 & 21 Vict., c. 60, § 358.

[2] R. *v.* Lands, 25 L. J., M. C., 14; 1 Pear. & Dear. C. C. 567, S. C.

[3] Id.

[4] 12 & 13 Vict., c. 106, § 234, enacts, that "in any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the Court for anything done under such warrant, no proof shall be required at the trial, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignees or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees, or other person, shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may, if he think fit, grant a certificate of such proof or admission; and such assignees, or other person, shall be entitled to the costs occasioned by such notice, and such costs shall, if such assignees, or other person, shall obtain a verdict, be added to the

§ 1557. The notice, under the Act, which does not require personal service, but may be served upon the attorney[1] of the assignees, or even upon their clerk at their counting-house,[2] or the like, must be given at common law *on or before pleading*,[3] if the assignees be plaintiffs, or *before issue joined*,[4] if they be defendants; and in equity, within ten days after the cause is at issue,[5] in all cases. With respect to the *form* of the notice, it must be specific; and therefore, if it simply states an intention to dispute "the bankruptcy," it will not suffice;[6] and if, to dispute "the act of bankruptcy," it will admit the trading and the petitioning creditor's debt.[7] Where the assignees are plaintiffs at common law, they cannot be put to the proof of the preliminary matters, either by the mere service of a notice without a plea

costs, and, if the other party shall obtain a verdict, shall be deducted from the costs, which such other party would otherwise be entitled to receive from such assignees or other person."

§ 235 enacts, that "in all suits in equity, other than a suit brought by the assignees for any debt or demand for which the bankrupt might have sustained a suit in equity had he not been adjudged bankrupt, and whether at the suit of or against the assignees, no proof shall be required at the hearing, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after *rejoinder*,* give notice in writing to the assignees of their intention to dispute some and which of such matters; and where such notice shall have been given, if the assignees shall prove the matter so disputed, the costs occasioned by such notice, shall, if the Court see fit, be paid by the parties so giving such notice as aforesaid, and the service of such notice may be proved by affidavit upon the hearing of the cause." The Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict., c. 60, contains in §§ 359 & 360, somewhat similar provisions.

[1] Howard *v.* Ramsbottom, 3 Taunt. 526.

[2] Widger *v.* Browning, 2 C. & P. 523, per Abbott, C. J.; M. & M. 27, S. C.

[3] Poole *v.* Bell, 1 Stark. R. 328; Lawrence *v.* Crowder, 2 C. & P. 229.

[4] Richmond *v.* Heapy, 4 Camp. 207, per Lord Ellenborough.

[5] The statute says "after rejoinder," see § 235 of the Act, as cited supra; but as rejoinders were abolished by the 93rd Order of 1845, that term was evidently used by mistake, and the meaning of the enactment is as stated in the text. Pennell *v.* Hume, 25 L. J., Ch., 32, per Kindersley, V.-C.

[6] Trimley *v.* Unwin, 6 B. & C. 537; 9 D. & R. 548, S. C.

[7] Porter *v.* Walker, 1 M. & Gr. 686; 1 Scott, N. R. 568, S. C.; Hernamann *v.* Barber, 14 Com. B. 583.

* *Sic.* See note 5, supra.

denying their title, or by such plea without a notice; but there must be both plea and notice.[1] Neither will an answer in equity, disputing the legality of the bankruptcy, be regarded as tantamount to the statutory notice.[2] The rule requiring notice extends, with the single exception stated in the last section, to all actions alike, whether in assumpsit, debt, case, trover,[3] trespass,[4] or even ejectment;[5] and this, too, whether or not it appears on the face of the record that the assignees are suing or being sued as such, provided it be clear that the opposite party must have known that the bankruptcy would in point of fact be relied upon.[6] It also applies to actions brought by the bankrupt himself against the assignees;[7] to cases where the servants of the assignees are joined with them as defendants;[8] and to actions brought against any person acting under the warrant of the Court, for anything done under such warrant. But the rule is inapplicable to a feigned issue;[9] or to a case where the assignees are strangers to the record, and their title comes incidentally in question;[10] and here, therefore, notwithstanding the want of notice, the title of the assignees must be strictly proved.

§ 1558. It has already been shown, that the *deposition* of any witness who, under any bankruptcy, or any petition for arrangement with creditors, has deposed to the petitioning creditor's debt, the trading, or the act of bankruptcy, will, in the event of his *death*, be receivable in evidence of the matters therein contained;[11] that the bankrupt and his debtors may be estopped from

[1] Moon *v.* Raphael, 7 C. & P. 115; Scott *v.* Thomas, 6 C. & P. 611, as explained in Buckton *v.* Frost, 8 A. & E. 845, n. *a*; Reg. Plead., H. T., 16 Vict., r. 5; 1 E. & B. lxxix.

[2] Pennell *v.* Hume, 25 L. J., Ch., 30.

[3] Butler *v.* Hobson, 4 Bing. N. C. 290; Buckton *v.* Frost, 8 A. & E. 844; 1 P. & D. 102, S. C.

[4] Gilman *v.* Cousins, 2 Stark. R. 182.

[5] Doe *v.* Liversedge, 11 M. & W. 517.

[6] Fawcett *v.* Fearne, 6 Q. B. 25, n.; Simmonds *v.* Knight, 3 Camp. 251.

[7] Ex parte Dick, 1 Rose, 41.

[8] Gilman *v.* Cousins, 2 Stark. R. 182, per Bayley, J.

[9] Lott *v.* Melville, 3 M. & Gr. 40; 3 Scott, N. R. 346, S. C. See Linnit *v.* Chaffers, 4 Q. B. 762.

[10] Doe *v.* Liston, 4 Taunt. 741.

[11] Ante, § 461.

disputing the bankruptcy, or the date of the fiat, or petition for adjudication, if such date be subsequent to the 11th of November, 1842, by putting in the *Gazette* containing the advertisement of the bankruptcy, and showing that the bankrupt has not disputed the fiat or petition within the prescribed period;[1] and that the bankrupt will, in certain cases, be protected by putting in his *certificate of conformity.*[2]

§ 1559. Next, as to the judicial proceedings of the Courts for the relief of *Insolvent Debtors.* The admissibility and effect of the vesting order, and of the appointment of assignees, are mainly regulated by § 46 of the Act of 1 & 2 Vict., c. 110, which enacts, that a certified copy of these documents shall be sufficient evidence of the title of the provisional assignee, and of the other assignees respectively.[3] Upon this enactment it may be observed, first, that it does not preclude the assignee from proving his title by putting in the original documents instead of certified copies; secondly, that, although the assignee, on accepting the appointment, has vested in him all the estate of the insolvent from the date of the vesting order, the order for his appointment, though it recite that date, is no evidence of the time from which his title accrues; and, therefore, if it be necessary for him to show that he was entitled to the property at some time preceding the date of his appointment, he must establish that fact by proving the date of the vesting order; but, thirdly, he may prove that date, not only by means of the original order or a certified copy of it, but by putting in a certified copy of the adjudication of the discharge of the insolvent, which states the date of the vesting order, and is admissible evidence of such date, the statement being an essential part of the adjudication.[4] The removal of assignees may be proved by a certified copy of the order for that purpose.[5] In short, all the proceedings in the Insolvent Debtors' Court may be proved, as before stated, by certified copies, which will be admitted in all courts as sufficient evidence of the same respectively.[6] If an

[1] Ante, § 1477. [2] Ante, § 1394. [3] See ante, § 1395.
[4] Yorke *v.* Brown, 10 M. & W. 78.
[5] 1 & 2 Vict., c. 110, § 65. [6] Id., § 105, cited ante, § 1395.

action be brought against an insolvent debtor upon any new contract or security for the payment of any debt, with respect to which he has become entitled to the benefit of the Act, he may plead his discharge generally, and defeat his adversary by putting in a certified copy of the adjudication, of the schedule of debts sworn to by him, and of his petition.[1] This last document should be put in to avoid disputes, though, perhaps, it is not strictly necessary.[2] It may here be added, that the usual copy of the causes of an insolvent's detention, filed with the petition, and bearing the seal of the Court, is not evidence of the fact alleged in it, that the insolvent was in actual custody at the time of his petition, because such document is not a proceeding of the Court within the meaning of § 105 of the Act.[3]

§ 1560. Passing now to other judicial documents, little need be said respecting their admissibility and effect. It has already been stated, that *answers* in Chancery, and signed pleadings in the Scotch courts, are receivable against the party by whom they were sworn, as cogent admissions of the allegations which they contain;[4] but *demurrers* and *pleas* in equity are not so receivable, since *they* are merely hypothetical statements, which, *assuming* the facts to be as alleged, deny that the defendant is bound to answer.[5] With respect to *bills* in Chancery, it is now finally determined, that whether they be bills for relief or for discovery, they are alike inadmissible, excepting to prove their own existence, or the institution of a suit, or that certain facts were in issue between the parties: their exclusion for other purposes resting upon the ground that they contain nothing more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath.[6] It seems to follow by a parity of reasoning, that pleadings at common law are also inadmissible as evidence of the truth of the facts stated

[1] 1 & 2 Vict., c. 110, § 91. See Reid *v.* Croft, 5 Bing. N. C. 68.
[2] See ante, § 1410. See also Hounsfield *v.* Drury, 11 A. & E. 98.
[3] Hills *v.* Mitson, 8 Ex. R. 751.
[4] Ante, § 657.
[5] Ante, § 759.
[6] Boileau *v.* Rutlin, 2 Ex. R. 665; Doe *v.* Sybourn, 7 T. R. 3, per Lord Kenyon; Taylor *v.* Cole, id. n.; ante, § 786.

therein;[1] unless, indeed, they be such pleadings as under the Common Law Procedure Act, 1852, require to be verified by affidavit.[2]

§ 1561.[3] *Depositions*, though informally taken, are receivable, like any other admissions, against the deponent whenever he is a party;[4] or they may be used to contradict and impeach him, when he is afterwards examined as a witness.[5] But before they will be available as secondary evidence, and as a substitute for *vivâ voce* testimony, they must be proved to have been regularly taken, under legal proceedings duly pending, or on some other occasion sanctioned by law;[6] and, unless the case be provided for by statute, or by a rule of court, it must further appear, that the witness himself cannot be personally produced.[7] In some cases the depositions of deceased witnesses will be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are, à fortiori, admissible.

§ 1562. With respect to *rules, orders*, matters, and decisions, made or done in pursuance of the *Interpleader Acts*, these, except only the affidavits that are filed, may, with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry; and they will then be admissible in evidence; and the rules and orders so entered will have the effect of judgments, except only as to becoming charges on real property.[8]

§ 1563. When an application has been refused at chambers, its effect as a bar to any fresh summons will vary according to circumstances. If the words, "no order" be indorsed upon the

[1] Boileau *v.* Rutlin, 2 Ex. R. 680, 681, per Parke, B.
[2] See 15 & 16 Vict., c. 76, §§ 80, 81.
[3] Gr. Ev., §§ 552, 555, in part.
[4] Ante, § 657.
[5] Ante, §§ 1282, 1301, et seq.
[6] Ante, § 434, et seq.
[7] Ante, § 440, et seq.
[8] 1 & 2 Will. 4, c. 58, § 7; 9 & 10 Vict., c. 64, § 7, Ir.

summons, the judge will, in general, be held to have pronounced no decision upon the merits, and the party, who has failed, will consequently be allowed to make a second application; but if the indorsement be "application dismissed," this will be regarded as a judgment, which the applicant must move the Court to rescind.[1]

§ 1564. A refusal by justices in petty sessions to make an order for maintenance of a bastard, cannot be given in evidence as a bar to a second application on the part of the mother, though the original summons has been heard on the merits; but the justices at the second hearing may take into consideration the fact of the former dismissal, as a material element in guiding their judgment.[2] Again, if an order in bastardy be drawn up in such a form as to be void in law, it cannot be a bar to a second summons in the same matter between the same parties, even though it has never been formally set aside on appeal.[3]

§ 1565. The admissibility and effect of *awards* need not be discussed at any length. The decision of an arbitrator, who has been duly appointed, is as conclusive as the judgment of a competent tribunal upon the subject-matter referred to him;[4] and whether he be a professional or non-professional man,[5] the Court will not interfere with his award on the ground of any alleged error either in law or in fact,[6] provided, first, that he has not exceeded, or fallen short of, the authority conferred upon him,[7] next, that the award is final,[8] and certain,[9] and, lastly, that it does not prescribe what is either illegal,[10] or impossible. But an award, unlike a ver-

[1] R. v. Machen, 14 Q. B. 78, per Erle, J.

[2] Id. 74; 7 & 8 Vict., c. 101, § 2; 8 & 9 Vict., c. 10.

[3] R. v. Brisby, 1 Den. 416.

[4] Doe v. Rosser, 3 East, 15.

[5] Fuller v. Fenwick, 3 Com. B. 705, 711, per Wilde, C. J.; In re Brown & the Croydon Can. Co. 9 A. & E. 526, per Lord Denman.

[6] Toby v. Lovibond, 5 Com. B. 784, per Wilde, C. J.; Barrett v. Wilson, 1 C. M. & R. 586; Johnson v. Durant, 2 B. & Ad. 925; Phillips v. Evans, 12 M. & W. 309.

[7] In re Stroud, 8 Com. B. 518, per Maule, J.

[8] Bhear v. Harradine, 7 Ex. R. 269.

[9] Williams v. Wilson, 9 Ex. R. 90.

[10] Eastern Union Rail. Co. v. Eastern Count. Rail. Co., 2 E. & B. 540, per Lord Campbell; Alder v. Savill, 5 Taunt. 454.

dict or judgment, cannot be received as evidence in the nature of reputation.[1] It may also be noted, as the point has been thought worthy of argument, that an award is not evidence of an account stated between the parties to the submission;[2] unless, perhaps, in the single event of there being no regular agreement to refer, and, consequently, no award capable of being enforced in law. In such a case, as the arbitrator is not a judge, he might possibly be deemed the agent of the parties for the purpose of settling their accounts.[3]

§ 1565A. The Act passed in 1857 for the establishment of the New Court of Probate,[4] has extensively altered the law with respect to the admissibility and effect of probates, and of letters of administration with wills annexed. Formerly these documents were uniformly rejected, whether tendered as primary or as secondary evidence of the contents of a will, on the trial of any cause relating to real estate.[5] The ecclesiastical tribunals by which they were granted had no control over devises of real property; and so absurdly jealous were the temporal courts of spiritual interference, that even when a will of lands was irretrievably lost, nothing would induce them to look at the probate,[6] though had the inquiry related to personalty, such a document would have furnished conclusive evidence,[7] and though they readily received the testimony of a witness who undertook to state the contents of the will, having heard it once read before the testator's family on the day of his funeral.[8] This startling anomaly, after causing infinite injustice for a long series of years, has at length to a great extent been remedied. The New Act[9] first provides by § 61,[10] that where a will affecting real estate is proved in solemn

[1] Evans *v.* Rees, 10 A. & E. 151; 2 P. & D. 627, S. C.; R. *v.* Cotton, 3 Camp. 444; Wenman *v.* Mackenzie, 5 E. & B. 447; ante, § 561.

[2] Bates *v.* Townley, 2 Ex. R. 152.

[3] Keen *v.* Batshore, 1 Esp. 194, per Eyre, C. J.; commented on in Bates *v.* Townley, 2 Ex. R. 152.

[4] 20 & 21 Vict., c. 77; and 20 & 21 Vict., c. 79, Ir.

[5] Doe *v.* Calvert, 2 Camp. 389, per Lord Ellenborough. [6] Id.

[7] Allen *v.* Dundas, 3 T. R. 125.

[8] 2 Camp. 390, n., citing Anon. case, coram Wood, B.

[9] 20 & 21 Vict., c. 77.

[10] See corresponding enactment in the Irish Act, 20 & 21 Vict., c. 79, § 65.

form, or is otherwise the subject of a contentious proceeding in the Court of Probate, the heir, devisees, and other persons interested in the real estate shall, as a general rule, be cited to see proceedings, or to become parties.[1] § 62 [2] then enacts, that, "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a *copy thereof* respectively, *stamped* with the *seal* of Her Majesty's Court of Probate, shall in all courts, and in all suits and proceedings affecting real estate, of whatever tenure, (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration,) be received as *conclusive evidence of the validity and contents of such will*, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." § 63 [3] empowers the Court of Probate, at its discretion, to proceed in any case without citing the heir or other persons interested in real estate; but it provides that the probate, decree, or order of the court, shall not affect any such person, "unless he has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

[1] See Reg. 34 of Rules for Ct. of Prob. in contentious business, and Form, No. 4.

[2] See corresponding enactment in the Irish Act, 20 & 21 Vict., c. 79, § 66.

[3] See also 20 & 21 Vict., c. 79, § 67, Ir.

§ 1565 B. Next comes a very important clause, for § 64[1] enacts, that "in any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, *ten days* at least before the trial or other proceeding in which the said proof shall be intended to be adduced, *notice* that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the *probate* of the said will or the *letters of administration with the will annexed*, or a *copy thereof stamped* with any *seal* of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, *notwithstanding the same may not have been proved in solemn form*, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within *four days* after such receipt, give *notice* that he disputes the validity of such devise or other testamentary disposition." § 65[2] enacts, that "in every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the Court or judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid."

§ 1566. The Act of 14 & 15 Vict., c. 105, contains the following remarkable clause respecting the admissibility and effect of orders made by the Poor Law Board on questions touching the settlement, removal, and chargeability of paupers. § 12 enacts, that "the guardians of any two unions or parishes, or the guardians

[1] See also 20 & 21 Vict., c. 79, § 68, Ir. There the intervals allowed for giving notice are respectively *seven* days, and *three* days, instead of *ten* days and *four* days, as in the English Act. See further, 14 & 15 Vict., c. 57, § 108, Ir., as to a somewhat similar practice in the Civil Bill Courts, excepting that no notice is required to be given; and Jackson *v.* Jackson, Ir. Cir. R. 469. [2] See also 20 & 21 Vict., c. 79, § 69, Ir.

of a union and the guardians of a parish, or the guardians of a union or parish and the overseers of any parish, or the overseers of any two parishes, between whom any question affecting the settlement, removal, or chargeability of any poor person shall arise, may, if they think fit so to do, by agreement in writing, executed in respect of any guardians by sealing with their common seal, and in respect of overseers by the signatures of a majority of them, submit such question to the Poor Law Board for their decision; and the said board may, if they see fit, entertain such question, and by an *order* under their *seal* determine the same; and every such order shall be in all courts, and for all purposes, final and conclusive, between the parties submitting such question, as to the question therein determined."

§ 1567. Under the Stamp Acts, the Commissioners of Inland Revenue are intrusted with important powers for *resolving doubts* respecting the amount of *stamp duty* payable on particular instruments. On payment to them of a fee of 10*s*., they are required, at the instance of any person interested, and subject to appeal to the Court of Exchequer, to decide whether any document submitted to them be chargeable with stamp duty or not, and if it be chargeable, they must fix the amount. They must then impress upon the document a particular stamp, *denoting* either that no duty is chargeable, or that the proper duty has been paid; and in either event, the document so stamped "shall be receivable in evidence in all courts of law and equity, notwithstanding any objection made to the same" as being either chargeable with stamp duty, or insufficiently stamped.[1] Although the adjudication of the commissioners under these provisions operates as a judgment in rem, and is conclusive on strangers as well as on parties, it must be pronounced before objection has been taken to the reception of the document in evidence; and consequently, where a bond had been rejected at the trial as insufficiently stamped, the Court held that the objection was not removed, though the commissioners afterwards, but before the question was argued in Banc, had affixed upon the document a denoting stamp.[2]

[1] 13 & 14 Vict., c. 97, § 14; 16 & 17 Vict., c. 59, § 13.
[2] Prudential Mutual Assur. Assoc. *v.* Curzon, 8 Ex. R. 97.

§ 1568. It is not easy to lay down any precise rule as to how far *judicial documents* will be evidence of the *facts recited* in them. Thus, although it has been held, that a judge's order referring a cause may be proved by the rule, making it a rule of court, in which it is recited and incorporated;[1] yet a written and attested agreement of reference cannot be proved by the production of the rule of court.[2] The difference between these cases seems to be, that the judge's order is in itself a judicial act, the form, but not the character, of which is altered by its being made a rule of court, whereas a submission by written agreement is a mere contract; and, as the making it a rule of court is only an ex parte proceeding, it would be unjust, if the rule, thus obtained by one party behind the back of the other, were to be regarded as any evidence of the facts introduced into it.[3] Under the Trustee Act, 1850, all orders which are made by the Lord Chancellor in Lunacy, or by the Court of Chancery, for the purpose of conveying or assigning lands, or of releasing or disposing of contingent rights, and which are founded on allegations respecting the incapacity, absence, survivorship, death, or intestacy of any trustee or mortgagee, are rendered conclusive evidence of the matters contained in such allegations, "in any court of law or equity upon any question as to the legal validity" of any such order.[4]

§ 1569. It seems that the existence of a warrant of attorney cannot be proved, so as to render its production unnecessary, by putting in a rule of court setting it aside.[5] But, on the other hand, the production of a writ of supersedeas has on more than one occasion been deemed sufficient evidence both of the issuing of the fiat against a bankrupt, and of the fact of such fiat having been superseded.[6] It has recently, too, been held, that a warrant of commitment, in like manner with a conviction,[7] is evidence to a certain extent of the facts which it recites;[8] and therefore, in an

[1] Still v. Halford, 4 Camp. 17, per Lord Ellenborough; recognised in Berney v. Read, 7 Q. B. 82.
[2] Berney v. Read, 7 Q. B. 79.
[3] Id. 82, 83, per Lord Denman.
[4] 13 & 14 Vict., c. 60, § 44.
[5] Compton v. Chandless, 4 Esp. 18, per Lord Kenyon. See also Yorke v. Brown, 10 M. & W. 78.
[6] Gervis v. Grand Western Canal Co., 5 M. & Sel. 76; Wright v. Colls, 8 Com. B. 150.
[7] Ante, § 1482, et seq.

action against a justice for false imprisonment, if the warrant put in by the plaintiff recites the information on oath on which it purports to have been founded, such recital will relieve the defendant from the necessity of formally proving the information.[1]

§ 1570. The effect of a writ of fieri facias as evidence varies according to circumstances. If an execution debtor bring an action against the sheriff for seizing his goods, the defendant may justify his conduct by producing the writ without any copy of the judgment; but if the action be brought by a stranger, both the writ and the judgment must be proved.[2] The reason for this distinction seems to be, that, in the former case, the plaintiff, having been a party to the original action, must be aware of the existence of the judgment, and might have moved to set it aside, if it be open to objection.[3] The rule being once established, it applies as well to a case where the vendee of the sheriff is a party, as where it is the sheriff himself, and where he is plaintiff as well as where he is defendant.[4] Perhaps, however, the rule does not apply, where the purchaser from the sheriff is the execution creditor.[5]

§ 1571. The general admissibility of *inquisitions* rests upon the ground, that they contain the result of inquiries made under competent authority, concerning matters in which the public are concerned.[6] As such, they are receivable even against strangers, though, as before observed, they are far from being conclusive evidence.[7] These documents, since the abolition of writs of right, and the passing of the modern statutes of limitation, have become of much less importance than they formerly were, as sources of evidence. They are still, however, occasionally of value, especially in matters of pedigree,[8] in questions respecting the right of

[1] Haylock *v.* Sparke, 22 L. J., M. C., 67; 1 E. & B. 471, S. C. This case seems to overrule Stephens *v.* Clark, 2 M. & Rob. 435, per Cresswell, J. See ante, § 658.

[2] Doe *v.* Murless, 6 M. & Sel. 114, per Bayley, J.

[3] Id.

[4] Id.; ante, § 659.

[5] Doe *v.* Smith, 2 Stark. R. 199.

[6] 2 Ph. Ev. 95.

[7] Ante, § 1487.

[8] See De Roos Peerage, 2 Coop. C. P. R. 545.

church patronage, or the existence or amount of a modus, and in peerage claims.

§ 1572. Among the most important of them may be mentioned *Domesday-book*,[1] a work of which every one has heard, though few persons are aware of its contents. This book, which is the most ancient inquisition extant, was compiled a few years after the Conquest by commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of the manors, the presbyters of every church, the reves of every hundred, and the bailiffs and six villans of every village. It contains a general survey of all the counties in England, except the four northern, and specifies the name and local position of each place; its possessor in the time of King Edward the Confessor; its possessor at the time of the survey; how many hides in the manor; how many carrucates in demesne; how many homagers, cotarii, servi, freemen, and tenants in socage;—what quantity of wood, meadow, and pasture; what mills and fish-ponds; what the gross value in King Edward's time, and at the time of the survey; and how much each freeman or sockman had at these respective periods.[2] If we are to believe Ingulphus, the learned Abbot of Croydon, the commissioners were not always remarkable for a strict impartiality;[3] but be this as it may, Domesday-book is not often available as practical evidence, owing to the frequent changes of name, which the hundreds and other places described in it have undergone since the eleventh century;[4] though it is only just to our antiquaries to state, that this defect has, to a certain extent, been remedied by their learned labours.

[1] Now deposited in the Record Office. See ante, § 1338. As to the mode of proving entries contained in it, see ante, § 1377.

[2] Those who wish for further information on this subject are referred to Sir H. Ellis's Introd. to Domesday, in two vols.; Ingulphus, ed. Gale, pp. 79, 80; Brady, History of Eng. 205—208; Miss Strickland's Lives of Queen's of Eng., vol. i., pp. 91—93.

[3] Ingulphus, ed. Gale, p. 79. His words are, "Isti penes nostrum monasterium benevoli et amantes, non ad *verum pretium* nec ad *verum spatium* monasterium librabant, misericorditer præcaventes in futurum Regiis exactionibus, et aliis oneribus, piissima nobis benevolentia providentes."

[4] Sir H. Ellis's Introd. vol. 1, p. 34.

§ 1573. The Visitation Books deposited at the Heralds' College,—which contain the pedigrees and coats of arms of the nobility and principal gentry in England, and which were compiled during the 16th and 17th centuries by heralds, acting under commissions from the Crown,[1]—have on many occasions been admitted in evidence as official records to establish or defeat pedigrees and peerage claims;[2] but in some cases, the House of Lords has first required the production of the commission under which the visitation was made.[3] It appears that copies of these visitations have been uniformly rejected;[4] though it is difficult to see on what ground, if the originals can be regarded as public official documents.[5]

§ 1574. The Down Survey, which was made during the reign of Charles II., is rendered conclusive by statute[6] as to the boundaries of what are called "the old and new interests," that is, of the lands apportioned between the aboriginal inhabitants of Ireland and the English and Scotch settlers; and it is also admissible in evidence as a public document on all questions between any persons respecting the matters stated in it.[7] The Books of Distributions, however, which are only abstracts of this famous survey cannot be received.[8] Again, the Ordnance Survey in Ireland, though notoriously drawn up with great care and accuracy, is not regarded by the courts of law as a public document, and it is consequently inadmissible.[9] Still, it deserves notice, that surveys

[1] Hubb. Ev. of Suc. 541, 542.

[2] Matthews v. Port, Comb. 63; Pitton v. Walter, 1 Stra. 162; Leigh Peer., 1829, part 2, 138; De Lisle Peer., Min. Ev., p. 12; Tracy Peer., Min. Ev. 18.

[3] Hubb. Ev. 546, et seq., and cases there cited.

[4] Matthews v. Port, Comb. 63; Earl of Thanet v. Forster, T. Jones, 224; Hubb. Ev. 548.

[5] See ante, §§ 1436, 1437. As to the admissibility of other books kept at the Heralds' College, see Hubb. Ev. 538—566.

[6] 14 & 15 Car. 2, c. 2, Ir.; 17 & 18 Car. 2, c. 2, § 5, Ir.

[7] Archbp. of Dublin v. Lord Trimleston, 12 Ir. Eq. R. 251.

[8] Id. See also id. as to when decrees of the Court of Claims are admissible.

[9] Swift v. Tiernan, 11 Ir. Eq. R. 602, per Brady, Ch.

and maps, though they cannot be treated as public documents, will occasionally be received in evidence as admissions of persons in privity with those against whom they are tendered.[1]

§ 1575. Old ecclesiastical *terriers*, which are returns of the temporal possessions of the church in every parish, made from time to time by virtue of the 87th canon, and deposited in the bishop's registry, or the registry of the archdeacon of the diocese, or occasionally, in the chest of the parish church, are receivable in evidence, when proved to have come from the proper repository.[2] Their admissibility appears to rest, partly upon the official character of the statements they contain, but principally upon the ground that they are admissions by persons, who stood in privity with the litigants.[3] Returns made by the incumbents of livings in answer to queries sent to them by the bishop of the diocese, for the information of the Governors of Queen Anne's Bounty, will also be admissible in evidence, on the same principle as inquisitions, where the question relates to the rights of the Church.[4]

§ 1576. Copies of Court Rolls, and especially presentments of manor courts, are, as already pointed out,[5] admissible in evidence, to prove either the customs or bounds of a manor, or any other matters of public and general interest connected with a manor, which are capable of being proved by evidence of reputation. Moreover, copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, will, in an action by the surrenderee wherein his ownership is disputed, be good evidence of the existence of the manor, and of such property being within it.[6] As between surrenderor and surrenderee, a presentment of an admittance

[1] Earl *v.* Lewis, 1 Esp. 1; Pollard *v.* Scott, Pea. R. 19; Wakeman *v.* West, 7 C. & P. 479; Doe *v.* Lakin, id. 481.

[2] 1 St. Ev. 238, 239; B. N. P. 248. The repository need not be the *most proper* place of deposit. See ante, §§ 594, et seq., and Croughton *v.* Blake, 12 M. & W. 208.

[3] 2 Ph. Ev. 120.

[4] Carr *v.* Mostyn, 5 Ex. R. 69.

[5] Ante, §§ 547, 548, 558.

[6] Standen *v.* Chrismas, 10 Q. B. 135.

upon a surrender out of court is primary evidence of the surrenderee's title, without producing the original surrender.[1]

§ 1577.[2] The principles on which *official registers* are entitled to credit have already been explained;[3] and it is here only necessary to add, that they are admissible as competent evidence of the facts they contain, provided such facts be required by law to be recorded in them for the public benefit, and be necessarily within the knowledge of the registering officer. Thus, a marriage register is evidence, not only of the fact of the marriage, but of the time of its celebration; for both these facts must have been known to the clergyman making the entry, and it was his duty to state them correctly in the register.[4] So, a register of baptism is evidence of that fact, and of its date; but it furnishes no proof of the age of the party, further than that he was born at such date, even though it state the day of his birth.[5] Neither taken *per se*, is it any evidence of the place where the child was born, although, if other circumstances be proved, as that the child at the time of baptism was very young, or had since been removed to the parish where the register was kept, or relieved by such parish while living beyond its limits, it may then, in connexion with these facts, afford presumptive evidence of the place of birth.[6] It seems, too, that, if the register contains a statement that the child was illegitimate, it may be read as *some* proof of that fact, being regarded as evidence of the reputation in the parish.[7] Registers of births and deaths, under the Registration Act,[8] are evidence, not only of the births and deaths to which they

[1] Doe v. Olley, 12 A. & E. 481. See also Doe v. Hall, 16 East, 208; Doe v. Mee, 4 B. & Ad. 617; R. v. Thurscross, 1 A. & E. 126.

[2] Gr. Ev., § 493, in some part.

[3] Ante, § 1429.

[4] Doe v. Barnes, 1 M. & Rob. 386, 389, per Lord Denman; 6 & 7 Will. 4, c. 86, § 38, cited ante, p. 1283, n. 3; R. v. Hawes, 1 Den. C. C. 270.

[5] R. v. Clapham, 4 C. & P. 29, per Lord Tenterden; Burghart v. Angerstein, 6 C. & P. 690, 696, per Alderson, B.; Wihen v. Law, 3 Stark. R. 63, per Bayley, J.

[6] R. v. North Petherton, 5 B. & C. 508, 510; R. v. Lubbenham, 5 B. & Ad. 968; R. v. St. Katharine, id. 970, n.

[7] Cope v. Cope, 1 M. & Rob. 271, 276, per Alderson, J.

[8] 6 & 7 Will. 4, c. 86, § 38, cited ante, p. 1283, n. 3.

relate, but of the place where these events occurred, whenever by the direction of the Registrar-General that fact has been added to the entry.[1] Again, the daily books of a public prison are good evidence to prove the time of a prisoner's commitment or discharge,[2] but not the cause of his commitment.[3] So, the log-book of a convoy-man-of-war, transferred from the Admiralty to the Record Office,[4] is evidence to prove the time of sailing, and the general motions, of the fleet.[5] So, the books of the Sick and Hurt Office, and the muster-books of the Navy Office, which are now under the custody of the Master of the Rolls,[6] are admissible to prove the death of a sailor, and the time when it occurred;[7] and the latter books may also be read to show what ship the sailor belonged to, and the amount of wages due to him.[8] In all these and similar cases, the register does not prove the identity of the parties there named with the parties in question; but that fact must be established by other proof, though slight evidence will in most cases be sufficient.[9]

§ 1578. Land-tax assessments are, it seems, admissible to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and, perhaps, they may be taken in connexion with other facts, as some evidence of occupation or

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[1] 7 Will. 4, & 1 Vict., c. 22, § 8, enacts, that "it shall be lawful for the Registrar-General, if he shall think fit, to direct that the place of birth or death of any person, whose birth or death shall be registered under the said Act for registering births, deaths, and marriages, shall be added to the entry, in such manner as the Registrar-General shall direct; and such addition, when so made, shall be taken to all intents to be part of the entry in the register."

[2] R. v. Aickles, 1 Lea. C. C. 191.

[3] Salte v. Thomas, 3 B. & P. 188.

[4] See ante, § 1338.

[5] D'Israeli v. Jowett, 1 Esp. 427; Watson v. King, 4 Camp. 275.

[6] See ante, § 1338.

[7] Wallace v. Cook, 5 Esp. 117; R. v. Rhodes, 1 Lea, C. C. 24; Barber v. Holmes, 3 Esp. 190. See Heathcote's Divorce, 1 Macq. Sc. Cas., H. of L. 277, where a log book being produced to prove that an officer of the ship was at a certain place on a given time, the House of Lords required further evidence of that fact.

[8] R. v. Fitzgerald, 1 Lea. C. C. 20; R. v. Rhodes, id. 24.

[9] Birt v. Barlow, 1 Doug. 170; Bain v. Mason, 1 C. & P. 202, 203, n.; Barber v. Holmes, 3 Esp. 190; Wedgwood's case, 8 Greenl. 75.

seisin.[1] So, the poor-law valuations in Ireland have been received on one or two occasions as some evidence of the value of the lands comprised in them.[2] So, the rate-books of an Irish poor-law union are primâ facie, but not conclusive, evidence of the liability of a person rated therein as immediate lessor.[3] Again, the bank-books are admissible, and indeed the best evidence, to prove the transfer of stock.[4] So, the poll-books at a parliamentary[5] or municipal[6] election, are evidence of the votes given; but the custody of the latter must be strictly traced, so as to identify them as original papers.[7] An entry in a vestry-book, stating the election of a treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of the election, and of its regularity.[8] So, in an action for disturbing the plaintiff in the enjoyment of a pew, claimed in right of his messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the pew had been repaired by a former owner of the messuage, under whom the plaintiff claimed, in consideration of his using it, was held to be admissible evidence in support of the plaintiff's right, as having been made by the churchwardens within the scope of their official authority.[9] But old entries in a vestry-book, made by a churchwarden apparently not in the discharge of any public duty, and by which he has not charged himself, have been rejected.[10]

§ 1579. With respect to many official registers, the Legislature has interposed, and expressly made them evidence. For instance, every register of a British ship, and every examined or certified

[1] Doe *v.* Seaton, 2 A. & E. 170, 178; Doe *v.* Arkwright, id. 182, n.; 5 C. & P. 575, and 1 N. & M. 731, S. C.; Doe *v.* Cartwright, Ry. & M. 62; 1 C. & P. 218, S. C.; Ronkendorff *v.* Taylor, 4 Peters, 349, 360.

[2] Swift *v.* M'Tiernan, 11 Ir. Eq. R. 602, per Brady, Ch.; Welland *v.* Lord Middleton, id. 603, per Sugden, Ch.

[3] Castlebar Guardians *v.* Earl of Lucan, 13 Ir. Law R. 44.

[4] Breton *v.* Cope, Pea. R. 30; Marsh *v.* Colnett, 2 Esp. 665.

[5] Mead *v.* Robinson, Willes, 422; 6 & 7 Vict., c. 18, §§ 94—96; 13 & 14 Vict., c. 69, §§ 99—102, Ir.

[6] R. *v.* Ledgard, 8 A. & E. 535.

[7] Id.; 5 & 6 Will. 4, c. 76, §§ 32, 35.

[8] R. *v.* Martin, 2 Camp. 100; Hartley *v.* Cook, 5 C. & P. 441.

[9] Price *v.* Littlewood, 3 Camp. 288, per Lord Ellenborough.

[10] Cook *v.* Banks, 2 C. & P. 478.

copy of such register, is, by virtue of § 107 of the Merchant Shipping Act of 1854, receivable in evidence as primâ facie proof of all matters contained or recited therein.[1] So all entries made in any official log-book, as directed by the same Act, are receivable in evidence "in any proceeding in any court of justice, subject to all just exceptions."[2] The registers, too, of shareholders, which are kept in pursuance of the Joint Stock Companies' Act, 1856, are made evidence of any matters by that Act directed or authorised to be inserted therein;[3] that is, they are evidence, among other particulars, of the names, addresses, and occupations of the shareholders,—of the shares held by each shareholder, distinguishing each share by its number,—of the date at which the name of any shareholder was entered in the register,—and of the date at which any person ceased to be a shareholder in respect of any share.[4] Again, it was long considered that the copy of a stage-coach licence, kept at the licensing office, was no evidence that the persons named therein were the owners of the coach;[5] but it is now enacted, that a certified copy of the filed copy of any such licence shall be received against every person appearing by such copy to be named in such licence, as evidence of the same having been duly granted, and of its contents, and of every indorsement thereon;[6] and among the particulars which must be specified in each licence, are the names and residences of all the proprietors.[7] So, the registers of licences granted in respect of the metropolitan public carriages, would seem, by statute, to be sufficient proof of all things therein contained.[8] So the registers of copyright are made "primâ facie proof of the proprietorship or assignment of copyright or licence as therein expressed," and, "in the case of dramatic or musical pieces, are primâ facie proof of the right of representation or performance."[9]

[1] 17 & 18 Vict., c. 104, § 107, and 18 & 19 Vict., c. 91, § 15, both cited ante, p. 1287, n. 3. See Myers v. Willis, 17 Com. B. 77, and 18 Com. B. 886, S. C. [2] § 285. [3] 19 & 20 Vict., c. 47, § 26. [4] § 16.

[5] Strother v. Willan, 4 Camp. 24, per Gibbs, C. J.

[6] 5 & 6 Vict., c. 79, § 10, cited ante, p. 1296, n. 1.

[7] 2 & 3 Will. 4, c. 120, § 11.

[8] 6 & 7 Vict., c. 86, § 16, cited ante, p. 1295, n. 8. See also 16 & 17 Vict., c. 112, § 12, Ir.

[9] 5 & 6 Vict., c. 45, § 11, cited ante, p. 1220, n. 4; and 7 & 8 Vict., c. 12, § 8.

§ 1580. It has been shown that certified copies of the declarations of proprietorship of newspapers filed at the Office of Inland Revenue are, in all proceedings, civil and criminal, touching any newspaper, or any matter contained therein, *conclusive* evidence of the truth of the statements set forth in the declarations, as against every person who has signed them.[1] Whether an action against the proprietors of a newspaper for the value of articles written by a contributor, is a proceeding touching a newspaper within the meaning of this provision, may admit of much doubt; but even if it be, the plaintiff cannot succeed, on merely producing a copy of the declarations signed by the defendants, if it appear that, in point of fact, the plaintiff's contract for the supply of the articles was exclusively made with a third party, being the real proprietor, upon his sole responsibility, and that consequently no credit was actually given to the defendants.[2] So, certified copies of the memorials filed at the office of Inland Revenue by banking copartnerships, are receivable in evidence, "as proof of the appointment and authority of the public officers named in such account or return, and also of the fact, that all persons named therein as members of such corporation or copartnership, were members thereof at the date of such account or return."[3] If these memorials have not been filed within the time limited by the Act, they cannot be received in evidence;[4] and when they are admissible, they by no means preclude parties from having recourse to other proof of the facts contained in them.[5]

§ 1581. The admissibility of the *books of corporations* depends, at common law, on the nature of the acts recorded. If these are obviously of a public character, and the entries have been made by the proper officer, they will be received in evidence either for or against the corporation;[6] but if they relate to the private

[1] Ante, p. 1289, n. 5. See Watts *v.* Lyons, 6 M. & Gr. 1047.
[2] Holcroft *v.* Hoggins, 2 Com. B. 488.
[3] 7 Geo. 4, c. 46, §§ 4, 6; ante, p. 1289.
[4] Prescott *v.* Buffery, 1 Com. B. 41.
[5] Edwards *v.* Buchanan, 3 B. & Ad. 788; R. *v.* Carter, 1 Den. C. C. 65.
[6] R. *v.* Mothersell, 1 Str. 93; Thetford's case, 12 Vin. Abr. 90, pl. 16; 2 Camp. 101, n.

transactions of the corporate body, they will be inadmissible, except, perhaps, in actions between their own members.[1] At common law, these books, whatever be the nature of the entries, can seldom be adduced by the corporation, in support of its own claims against a stranger;[2] but by the statute law such books are not unfrequently rendered admissible. Thus, the books containing minutes of the resolutions and proceedings of the general meetings of joint stock and banking[3] companies, and purporting to be signed by the presiding chairman, are primâ facie evidence, not only of the facts therein entered, but of the meetings having been duly convened.[4] So, the registers of shareholders in companies subject to the provisions of the Companies Clauses Consolidation Act, furnish primâ facie evidence of the defendant being a shareholder, and of the number and amount of his shares, in all actions for calls brought by the company.[5] Parliament having, in the above instances, disregarded the common-law rule, which prohibits a man from producing his own books as evidence for himself, the courts will take care, before they permit a company to avail itself of such an exceptional privilege, that the provisions of the statute conferring the privilege have been strictly complied with.[6] Besides these examples, a great variety of semi-

[1] Marriage v. Lawrence, 3 B. & A. 144; Gibbon's case, 17 How. St. Tr. 810.

[2] London v. Lynn, 1 H. Bl. 214, n. s; Corp. of Waterford v. Price, 9 Ir. Law R. 310; Com. v. Woelper, 3 Serg. & R. 29; Highland Turnp. Co. v. McKean, 10 Johns. 154.

[3] See 20 & 21 Vict., c. 49, § 2.

[4] 19 & 20 Vict., c. 47, § 40, cited ante, § 1434. See also § 81 of the same Act, which enacts, that on any application for the winding-up of a company, "all books, accounts, and documents of the company, and of the liquidators [appointed under the Act], shall, as between the contributories of the company, be primâ facie evidence of the truth of all matters therein contained, and purporting to be therein recorded."

[5] 8 & 9 Vict., c. 16, § 28. See Waterford Rail. Co. v. Wolsely, 1 Ir. Law R., N. S., 444.

[6] Bain v. Whitehaven & Furness Junct. Rail. Co., 3 H. of Lords Cas. 22, per Lord Brougham; Birkenhead, Lancashire & Cheshire Junct. Rail. Co. v. Brownrigg, 4 Ex. R. 426; London & North-Western Rail. Co. v. McMichael, 5 Ex. R. 855; West Cornwall Rail. Co. v. Mowatt, 15 Q. B. 521. See Inglis v. Gr. North Rail. Co., 1 Macq. Sc. Cas. H. of L. 112,

public books and documents might be mentioned, the admissibility and effect of which depend upon special legislative enactment; but as the most important of these have already been incidentally noticed while discussing the mode of proving public documents, it is not deemed expedient again to advert to them.

§ 1582. A *rule of law* of some practical value has of late years been established respecting the *mode of signing books*, which contain entries of the proceedings of commissioners, directors of companies, public trustees, and the like, at their general meetings. By a great variety of statutes, such books are rendered admissible as evidence of the proceedings entered in them; but it not unfrequently happens that the Act contains a clause directing the chairman to subscribe his name to the minutes at each meeting. Notwithstanding this clause, the Courts have held, that the fact of the signature being attached *at the meeting*, is not a condition precedent to the admissibility of the entry, provided it has been signed at some future time by the person who actually presided as chairman.[1] Considering the loose manner in which the directions contained in local and personal Acts are usually followed, this ruling has at least the advantage of being highly convenient.

§ 1583. While treating of the mode of proving certificates, reference has been made to a considerable number of those documents, which are rendered by statute admissible evidence of the particular facts certified therein.[2] To these no further allusion is necessary; but with respect to one or two, which have not yet been mentioned, it may be desirable to say a few words. And, first, the Court of Queen's Bench has decided,—Mr. Justice Erle,

117, 118; Waterford, Wexford, Wicklow, & Dublin Rail. Co. *v.* Pidcock, 8 Ex. R. 279.

[1] Southampton Dock Co. *v.* Richards, 1 M. & Gr. 448; Miles *v.* Bough, 3 Q. B. 845; 3 G. & D. 119, S. C.; in re Jennings, 1 Ir. Eq. R., N. S., 236. See Inglis *v.* Gr. North. Rail. Co., 1 Macq. Sc. Cas. H. of L. 112, in which it was held, that, where a meeting of a Scotch Railway Company's Finance Committee was adjourned, it was sufficient that the minutes of the adjourned meeting were signed, though § 101 of 8 & 9 Vict., c. 17, requires that "*every* entry shall be signed by the chairman of such meeting."

[2] Ante, § 1441, et seq.

however, dissenting from the judgment,—that where an amendment of the rules of a Friendly Society had received the barrister's certificate under the repealed stat. 4 & 5 Will. 4, c. 40, § 4, such certificate was *conclusive* of the validity of the amendment from the day it bore date, at least so far as the members of the society were concerned.[1] On the other hand, the same court has held that the certificate of the barrister under the Act of 6 & 7 Vict., c. 36, which exempts Scientific and Literary Societies from rates, does *not* furnish *conclusive* proof that the society named in the certificate is entitled to the benefit of that Act.[2]

§ 1584.[3] It may be further observed, that, at common law, a certificate of a mere matter of fact, not coupled with any matter of law, cannot in general be received as evidence, even though given by a person in an official situation.[4] If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and will therefore be rejected.[5] So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed.[6] Even the certificate of the Sovereign, under the sign-manual, cannot be received.[7]

§ 1585.[8] *Books and chronicles of public history* may be here mentioned, as partaking in some degree of the nature of public

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[1] Dewhurst *v.* Clarkson, 3 E. & B. 194. This is now the law by statute; see 18 & 19 Vict., c. 63, § 27.

[2] R. *v.* Phillips, 8 Q. B. 745.

[3] Gr. Ev., § 498, in part.

[4] Omichund *v.* Barker, Willes, R. 549, 550.

[5] Sewell *v.* Corp, 1 C. & P. 392; Drake *v.* Marryat, 1 B. & C. 473; Roberts *v.* Eddington, 4 Esp. 88; Waldron *v.* Coombe, 3 Taunt. 162; 2 Ph. Ev. 125; R. *v.* Sewell, 8 Q. B. 161; Oakes *v.* Hill, 14 Pick. 442, 448; Wolfe *v.* Washburn, 6 Cowen, 261; Jackson *v.* Miller, id. 751; U. S. *v.* Buford, 3 Peters, 12, 29.

[6] Johnson *v.* Hocker, 1 Dall. 406, 407; Governor *v.* Bell, 3 Murph. 331; Governor *v.* Jeffreys, 1 Hawks, 207; Stewart *v.* Alison, 6 Serg. & R. 324, 329.

[7] Omichund *v.* Barker, Willes, R. 550.

[8] Gr. Ev., § 497, in part.

documents, and as being entitled, on the same principles, to a certain degree of credit. Any approved public and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of this or of any foreign country.[1] But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible.[2] A fortiori, peerages, army and navy lists, law lists, clergy lists, court guides, directories, university calendars, and other non-official publications of a similar nature, cannot be received in evidence, however useful they may be to the genealogist, in aiding his researches, and directing him to the sources from which the information contained in them was derived.[3]

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[1] B. N. P. 248, 249; case of Warren Hastings, referred to by Lord Ellenborough, in Picton's case, 30 How. St. Tr. 492; 2 Ph. Ev. 123; Lord Bridgewater's case, cited Skin. 15; Morris *v.* Harmer, 7 Peters, 554; Lord Brounker *v.* Atkyns, Skin. 14; St. Catherine's Hospital case, 1 Vent. 151; Neale *v.* Fry, cited 1 Salk. 281; S. C. nom. Neal *v.* Jay, cited 12 Mod. 86; S. C. nom. Lady Ivy & Neal's case, cited Skin. 623. In each of the three last-named reports, it is distinctly stated that Chronicles were admitted in that case to prove on behalf of the plaintiff that King Philip did *not* assume the style of King of Spain before a certain time; but on turning to Mossam *v.* Ivy, 10 How. St. Tr. 555, which seems to be the same case, no Chronicles appear to have been offered in evidence for such a purpose. A history, indeed, was tendered by the defendant to prove when Charles the Fifth resigned, but this was rejected by Jeffreys, C. J., who, after styling the book in his characteristic manner, "a little lousy history," asked with evident irritability, "Is a printed history, *written by I know not who*, an evidence in a court of law?" p. 625. It is impossible to reconcile these conflicting reports. See Pea. Ev. 82, 83.

[2] Steyner *v.* Droitwich, Skin. 623; 1 Salk. 281; 12 Mod. 85, S. C.; Piercy's case, Tho. Jones, 164; Lee Peer., Min. Ev. 155; Evans *v.* Getting, 6 C. & P. 586, per Alderson, B.; 2 Ph. Ev. 123, 124; Hubb. Ev. 699—701.

[3] Marchmont Peer., Min. Ev. 62, 77; Hubb. Ev. 700—703.

CHAPTER V.

PRIVATE WRITINGS.

§ 1586.[1] THE only class of *written Evidence* which remains to be considered, is that of PRIVATE WRITINGS. And, in the discussion of this subject, it is not intended to mention separately each description of document comprised in this class; but to state the principles which govern the *inspection, production, proof, admissibility,* and *effect* of them all. And, first, as to the means of obtaining *before the trial* an INSPECTION or copy of such documents as are in the hands or power of the adverse party. This object was formerly attained in some cases without having recourse to a court either of law or equity; for, by the old rules of pleading, if either party claimed or justified under a deed which was mentioned in his pleading, and which ought properly to be either in his possession, or under his control, he was generally bound, unless he could allege, and prove, that the instrument had been lost or destroyed, or was in the hands of his opponent, to make *profert* of it, that is, to profess to bring it into Court; and then, the adversary, by *craving oyer,* or, in other words, by demanding to have the deed read, was entitled to inspect and copy it, on payment of a reasonable charge.[2]

§ 1587. The rule requiring profert, though conducive in many cases to the attainment of justice, was certainly open to two grave objections. In the first place, as it was confined to instruments

[1] Gr. Ev., § 557, in part, as to first six lines.

[2] See Steph. Pl. 482—486; Fisher *v.* Ford, 12 A. & E. 654; 4 P. & D. 347, S. C.; Read *v.* Brookman, 3 T. R. 151; Hill *v.* Marsden, 6 M. & W. 720; Hutchins *v.* Scott, 2 M. & W. 816; Hendy *v.* Stephenson, 10 East, 55; Wymarck's case, 5 Rep. 75 *a*; Totty *v.* Nesbitt, and Matison *v.* Atkinson, cited 3 T. R. 153; Carver *v.* Pinkney, 3 Lev. 82; Abp. of Canterbury *v.* Tubb, 3 Bing. N. C. 789; Sterne *v.* Mooney, 12 Ir. Law R. 47; Longmore *v.* Rogers, Willes, R. 288; 1 Wms. Saund. R. 9—9 *d.*

under seal, it had only a partial operation, and it thus stood in the way of any philosophical attempt to place all documents referred to in the pleadings on the same footing. And next, it occasionally caused much unnecessary prolixity, as, after oyer was craved, the whole deed, however long and irrelevant it might be, was set out verbatim on the record, and became part of the pleading of the person who was suing upon it. Yielding to the force of these objections, the Common Law Commissioners, in their report of 1851, recommended the abolition of the rule,[1] and their recommendation was carried out in the Common Law Procedure Act, 1852.[2]

§ 1588. Independent of the practice respecting profert and oyer, the judges, in the exercise of their equitable jurisdiction, were for many years in the habit of compelling, almost as a matter of course, the *inspection* of *all documents* which were *set forth* and relied upon by either party in his *pleading*, and which were of such kind as not strictly to require profert.[3] Thus, if a party brought an action upon a bill of exchange, a promissory note, a policy of insurance,[4] a guarantee,[5] or a written agreement, the defendant might, in general, obtain an inspection of the document declared upon, by applying to the Court, or, more conveniently, to a judge at chambers.[6] But, in order to ensure success, it was

[1] P. 25.

[2] § 55 of 15 & 16 Vict., c. 76, enacts that "it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made, it shall not entitle the opposite party to crave oyer or to set out upon oyer such deed or other document." § 56 enacts, that "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out." Similar provisions are contained in § 63 of the Irish Act, 16 & 17 Vict., c. 113.

[3] Steph. Pl., 486, 487.

[4] In actions on policies of insurance, the judges appear on one or two occasions to have made general orders that the assured should produce, *upon affidavit*, to the underwriters, *all the papers* in his possession relative to the cause; see Goldsmidt *v.* Marryat, 1 Camp. 562; Clifford *v.* Taylor, 1 Taunt. 167: sed qu.

[5] Bluck *v.* Gompertz, 2 L. M. & P. 597; 7 Ex. R. 67, S. C.

[6] Woolmer *v.* Devereux, 2 M. & Gr. 758; Blogg *v.* Kent, 6 Bing. 614; Thomas *v.* Dunn, 6 M. & Gr. 274.

advisable to support the application by the affidavit of the party, stating the special circumstances which rendered the inspection necessary; as, for instance, that the party had no recollection of ever having executed such an instrument, or that he had reason to believe that it had been altered since it was signed, or the like.[1] However, as this was a matter entirely for the discretion of the judge, an order to inspect *might*, and by some judges would, be granted in simple cases, without any such affidavit.[2] Still, if it appeared that the object of the defendant in seeking an inspection was vexatious, as if it were suggested that he wished to plead in abatement the non-joinder of other parties to the instrument, the Court would not entertain the application.[3] Neither would they interfere, so as to enable the defendant to fish out a defence, although they would grant an inspection for the purpose of assisting him in pleading a particular plea.[4]

§ 1589. In some cases it might happen that a plaintiff was desirous of bringing an action upon an *instrument* which *was in the hands* of his *opponent;* and then, if the plaintiff had executed, or was otherwise interested in, the instrument, and could not safely declare without inspecting it,[5] the Court, or rather the judge,—for these applications were generally made at chambers,[6] —would regard the holder in the light of a trustee, and would compel him to produce the document, so as to enable the plaintiff to read it, or to take a copy of it,[7] or to get it duly stamped.[8] Nor was this all; for although the instrument were

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[1] Woolmer *v.* Devereux, 2 M. & Gr. 759, per Tindal, C. J.

[2] Id., 2 M. & Gr. 758; 9 Dowl. 672, S. C., nom. Woolner *v.* Devereux.

[3] Beal *v.* Bird, 2 D. & R. 419.

[4] Birmingham, Bristol and Thames J. Rail. Co. *v.* White, 1 Q. B. 286—288. This, and the case cited in the preceding note, seem to overrule a dictum of Gibbs, J., in King *v.* King, 4 Taunt. 667.

[5] Rowe *v.* Howden, 4 Bing. 539, n., per Park, J.; Mayor of Arundel *v.* Holmes, 8 Dowl. 119, per Coleridge, J.

[6] Reid *v.* Coleman, 2 Cr. & Mee. 456.

[7] Blakey *v.* Porter, 1 Taunt. 386; King *v.* King, 4 Taunt. 666; Morrow *v.* Saunders, 1 B. & B. 318; 3 Moore, 671; S. C.; Mayor of Arundel *v.* Holmes, 8 Dowl. 118; Davenoge *v.* Bouverie, 8 Bing. 1.

[8] Bateman *v.* Phillips, 4 Taunt. 157; Reid *v.* Coleman, 2 Cr. & Mee. 456; Bousfield *v.* Godfrey, 5 Bing. 418.

not the direct foundation of the action or defence, but were merely matter of evidence to be used at the trial; still, if after having been executed by the two litigating parties, or by persons in privity with them, without a counterpart, it had been lodged in the hands of the one party for the use of both, the Court on motion, or a judge at chambers on summons, would generally compel its production, on the ground that the holder must, in such case, be deemed a mere trustee for the opposite party.[1]

§ 1590. So, if the party seeking to inspect the instrument had executed it, though the holder had not;[2] or if the applicant, without having actually signed the deed, were legally interested in it, the Court would usually compel the inspection prayed;[3] but they would never interfere to enforce the production of a document, to which the applicant was neither party nor privy, and in which he had no legal interest.[4] The question which was uniformly asked by the judges in cases of this nature, was, whether or not the deed or other instrument had been deposited in the hands of the holder as a *trustee* for the applicant only, or at least for the applicant jointly with himself; and unless this question were answered in the affirmative, the application could not be entertained.[5] Neither would a court of law, unless directed by statute,[6] ever compel the production of a private document, excepting at the instance of a party to a civil suit actually

[1] 2 Ph. Ev. 195; Bateman *v.* Phillips, 4 Taunt. 157; Gigner *v.* Bayly, 5 Moore, 71; Charnock *v.* Lumley, 5 Scott, 438; Reid *v.* Coleman, 2 Cr. & M. 456; Steadman *v.* Arden, 4 Dowl. & L. 16; 15 M. & W. 587, S. C.

[2] Morrow *v.* Saunders, 1 B. & B. 318; 3 Moore, 671, S. C.

[3] Bateman *v.* Phillips, 4 Taunt. 157; Browning *v.* Aylwin, 7 B. & C. 204; Doe d. Child *v.* Roe, 1 E. & B. 279.

[4] Smith *v.* Winter, 3 M. & W. 309; Cocks *v.* Nash, 9 Bing. 723; Lawrence *v.* Hooker, 5 Bing. 6; Rundle *v.* Beaumont, 4 Bing. 537; Rowe *v.* Howden, id. 538, n.; Ratcliffe *v.* Bleasby, 3 Bing. 148; Taylor *v.* Osborne, cited 4 Taunt. 159; Goodliff *v.* Fuller, 14 M. & W. 4; Pickering *v.* Noyes, 1 B. & C. 262; Powell *v.* Bradbury, 4 Com. B. 541; Pritchett *v.* Smart, 7 Com. B. 625; 6 Dowl. & L. 702, S. C.

[5] Pickering *v.* Noyes, 1 B. & C. 262; Blogg *v.* Kent, 6 Bing. 615, per Tindal, C. J.

[6] Post, § 1612.

pending, and for the purpose of assisting such party in the inquiry involved therein.[1]

§ 1591. In several cases a rule to inspect has been granted, though the party opposing the motion was not himself possessed of the document, where it appeared that he had some *legitimate control over it*;[2] as where it was lodged with his agent,[3] or his attorney,[4] or even with the attorney of a company of which he was a director,[5] or the like. The Court would seldom, if ever, interfere to compel a mere *stranger* to the suit to produce a document in his custody, in order that one of the parties might inspect it;[6] but where a demise had been executed by the lessor and lessee, and the latter had assigned it by way of mortgage, the Court, in an action of ejectment brought by the lessor for a forfeiture, made a rule absolute, which called upon the mortgagee to show cause why he should not allow the lessor to inspect and take a copy of the lease.[7]

§ 1592. In all cases where a party sought to inspect an instrument held by his opponent in which he had an interest, it was advisable, if not necessary, for him to state in his affidavit that he was not himself possessed of any copy, and that no counterpart was ever executed;[8] for it has been held, that if a party were to lose his counterpart of a deed, he would not be entitled to call

[1] 2 Ph. Ev. 199, 200; Ex parte Partridge, 1 Har. & W. 350.

[2] See post, § 1607.

[3] Gigner v. Bayly, 5 Moore, 71.

[4] Morrow v. Saunders, 3 Moore, 671.

[5] Steadman v. Arden, 4 Dowl. & L. 16; 15 M. & W. 587, S. C.; Ley v. Barlow, 1 Ex. R. 800. See Shaw v. Holmes, 3 Com. B. 952.

[6] Cocks v. Nash, 9 Bing. 723. In Parkhurst v. Gosden, 2 Com. B. 894, the Court refused to compel the judge of the Sheriff's Court in London to furnish the defendant with a copy of the notes taken by him on a former trial between the same parties, though the defendant moved upon an affidavit that the notes were necessary for his defence, in order to enable him to cross-examine the plaintiff's witnesses.

[7] Doe d. Morris v. Roe, 1 M. & W. 207.

[8] Morrow v. Saunders, 1 B. & B. 318; Griffin v. Smithe, 8 Dowl. 490; Lord Portmore v. Goring, 4 Bing. 152; 12 Moore, 363, S. C.; Bluck v. Gompertz, 7 Ex. R. 67; 2 L. M. & P. 597, S. C.; Doe v. Langford, 21 L. J., Q. B., 217.

upon his adversary to produce the other copy[1] for his mere inspection; though, perhaps, in such a case, the Court would compel the production of the other copy at the Office of Inland Revenue for the purpose of being stamped.[2]

§ 1593. It seems at one time to have been considered that, as no man is compellable to furnish evidence which may render him liable to a criminal prosecution, the Court would not order the inspection of documents on a suggestion of *forgery:*[3] but that doctrine was afterwards rejected; and it became the constant practice for judges at chambers to make such orders, when the applicant had reason to believe that the instrument on which his opponent relied had been forged.[4] The judges, however, would not in this, or, indeed, in any case, compel the party to whom the writing belonged to deposit it with the master of the Court, or with any other person; but allowing the owner to keep *possession* of the document, they would merely order him to permit his adversary and the witnesses to inspect it in his hands, or in the hands of his attorney.[5]

§ 1594. Such appear to be the principal rules, so far as they can be gathered from a multitude of not very consistent decisions, by which, prior to the 1st of November, 1851,[6] the judges at common law were guided in granting or refusing applications for the inspection of documents. Lord Mansfield, indeed, in the last century, was anxious to place this equitable and useful jurisdiction of the common-law judges upon a broader basis, and repeatedly held that, in order to avoid the expense and delay of a bill in

1 Street *v.* Brown, 6 Taunt. 302; Woodcock *v.* Worthington, 2 You. & J. 4.

2 Neale *v.* Swind, 1 Dowl. 314; 2 Cr. & J. 278, S. C.; Travis *v.* Collins, 2 Cr. & J. 625; 2 Tyr. 726, S. C.

3 Chetwind *v.* Marnell, 1 B. & P. 271, per Gibbs, C. J.; Hildyard *v.* Smith, 1 Bing. 451; 8 Moore, 586, S. C.

4 Thomas *v.* Dunn, 6 M. & Gr. 274; Woolmer *v.* Devereux, 2 M. & Gr. 759; 3 Scott, N. R. 224; 9 Dowl. 673, S. C.; Richey *v.* Ellis, 1 Alc. & Nap. 111.

5 Thomas *v.* Dunn, 6 M. & Gr. 274; Rogers *v.* Turner, 21 L. J., Ex., 9, per Alderson, B.

6 When the Act of 14 & 15 Vict., c. 99, came into operation.

Chancery, the courts of common law should compel inspection in all cases, where a discovery might be obtained by application to a court of equity.[1] But, as this enlightened doctrine did not meet with the sanction and approval of succeeding judges, it became necessary for the Legislature to interfere, and a clause was embodied in Lord Brougham's Evidence Act of 1851,[2] which supplied a satisfactory remedy for the principal evil complained of.

§ 1595. The enactment is in these words:—"Whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts of common law at Westminster or Dublin, or the Court of Common Pleas for the County Palatine of Lancaster, or the Court of Pleas for the county of Durham, such Court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to *inspect* all documents in the custody or under the control of such opposite party, relating to such action or other legal proceeding, and, if necessary, to take *examined copies* of the same, or to *procure* the same to be *duly stamped*, in all cases in which, previous to the passing of this Act, a *discovery* might have been obtained by filing a bill, or by any other proceeding, in a court of equity, at the instance of the party so making application as aforesaid to the said Court or judge."[3]

§ 1596. By the above clause it was not intended to confer upon courts of common law a power of discovery as extensive as that possessed by courts of equity. The ends which are sought to be attained by a bill of discovery, so far as relates to documents, are twofold; the first object being to discover the *existence* and *description* of writings supposed to be in the possession of the defendant; the second, to acquire a knowledge of their *contents*.[4] To this latter object alone the clause in question applies.[5] The

[1] Barry *v.* Alexander, 4 Doug. 15.
[2] 14 & 15 Vict., c. 99.
[3] Id., § 6.
[4] Pollock on Inspection of Documents, 9. 10.
[5] Id.; Hunt *v.* Hewitt, 7 Ex. R. 236; Galsworthy *v.* Norman, 21 L. J., Q. B., 70; Rayner *v.* Allhusen, 2 L. M. & P. 695; 21 L. J., Q. B., 68, S. C.

power was thus restricted by design. Lord Brougham, it is true, in common with those who acted with him, never doubted for an instant, that the courts of common law ought to be intrusted with full equitable powers of enforcing discovery, whether of documents under the control, or of facts within the knowledge, of either party to an action; but it was deemed inexpedient to press these views on the House of Lords in the session of 1851. The main object of Lord Brougham's bill of that year was to render parties to the record admissible witnesses; and, as Lord Truro, the Chancellor, vigorously opposed this innovation, it was considered not improbable that the plan would be defeated, if he were enabled to suggest the prudence of being satisfied in the first instance with trying the less dangerous experiment of granting powers of discovery to courts of law. As a matter of policy, therefore, no attempt was then made to confer on the courts of common law complete equitable powers of compelling discovery; but the clause was so expressed, as to give to the judges the mere power of ordinary *inspection* under certain limitations, when the applicant could state circumstances sufficient to raise a fair inference that the documents required to be produced were in the hands of his opponent.[1] It was felt that this alteration in the law was of itself a great improvement; and the advocates of legal reform were well assured that it would inevitably lead to still more extensive changes.[2]

§ 1597. Nor was their confidence misplaced; for, in 1854, the Legislature,—acting on the suggestion of the Common Law Commissioners,[3] "that each party to a suit at common law shall have a right to compel the other to discover and set forth what documents relating to the cause are in his possession or power,"—passed an enactment to carry these views into effect. The section in question is the 50th of the Act of 17 & 18 Vict., c. 125,[4] which

[1] Doe *v.* Langford, 21 L. J., Q. B., 217; Hunt *v.* Hewitt, 7 Ex. R. 243.

[2] This explanation has been given, because the Common Law Commissioners, in their second Report, have erroneously attributed the defect in the clause to an oversight, p. 35.

[3] Second Rep. p. 35.

[4] For a corresponding clause relative to Ireland, see 19 & 20 Vict., c. 102, § 55.

enacts, that, "Upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his *belief* that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or judge to order that the party against whom such application is made, or if such party is a body corporate that some officer to be named of such body corporate, shall *answer on affidavit*, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds,) to the production of such as are in his or their possession or power; and upon such affidavit being made, the Court or judge may make such further order thereon as shall be just."

§ 1598. This clause, read in connexion with § 6 of Lord Brougham's Act, would seem to have conferred on the common law courts all requisite powers for enforcing both the discovery and the inspection of documents. The mode of proceeding under both or either of the enactments is not yet definitively settled, but thus much may perhaps be safely predicated, that, to justify the application, 1st, an action or other "civil proceeding,"—which last term will include a mandamus to enforce a civil right, when the return to the writ is traversed,[1]—must be actually pending, though it is unnecessary that issue should be joined;[2] 2nd, the documents required to be produced must relate to the matters in dispute; 3rd, the case must be one in which the applicant would be entitled in equity to a discovery and inspection,[3] and, 4th, the affidavit in support of the motion must be made by the applicant himself.[4] It seems almost needless to add that the Court will refuse to make any order, if it appears that

[1] R. v. Ambergate, &c. Rail. Co., 17 Q. B. 957.

[2] Forshaw v. Lewis, 10 Ex. R. 712. See Rogers v. Turner, 21 L. J., Ex., 8.

[3] See Hunt v. Hewitt, 7 Ex. R. 242; Gomm v. Parratt, 26 L. J., C. P., 279.

[4] Herschfeld v. Clarke, 11 Ex. R. 712.

the real object of the applicant is not to get evidence available in the pending action, but to procure information which may be of use in ulterior proceedings against other parties.[1] If the application is likely to be resisted, the affidavit in support of it must state, 1st, the pendency of the suit; 2nd, its nature, so that the Court or judge may perceive what matters are really in dispute; 3rd, as it seems, the belief of the deponent that he has just ground to maintain or defend the suit; 4th, his belief that the documents in question are in the possession or power of his opponent;[2] and, 5th, the reason of the application, and the existence, nature, identification, and admissibility,[3] of the documents, in order that it may be seen that the object in view is to enable the applicant to support his own case, and not to find a flaw in the case of his opponent, and also that his opponent may be able with precision to admit or deny the possession of the documents.[4] To this affidavit the opponent may answer by swearing either that he has no such documents within his possession or power, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may submit to show parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the applicant's case.[5]

§ 1599. Bearing in mind these general observations, it may be well to illustrate them by referring briefly to the principal decisions which have been pronounced under Lord Brougham's Inspection Clause. At first, attempts were made to obtain orders for inspection on extremely vague and unsatisfactory affidavits. In one case the applicant merely swore that he was *advised* that certain documents in the possession of his adversary *might* be necessary as evidence on his behalf, and he neither stated that he *believed* such advice to be well founded, nor did he point out in what way the documents could advance his case. The rule was of course

[1] Temperley *v.* Willett, 25 L. J., Q. B., 259; 6 E. & B. 380, S. C.
[2] See Bray *v.* Finch, 1 H. & N. 468.
[3] Thompson *v.* Robson, 2 H. & N. 412.
[4] Hunt *v.* Hewitt, 7 Ex. R. 243, 244.
[5] Id. See Forshaw *v.* Lewis, 10 Ex. R. 712.

refused.[1] Another application shared the same fate, the affidavit failing to disclose how the inspection of the documents could aid in establishing the case of the deponent.[2] In most of the cases however, the main question has been, whether the applicant would have been entitled to relief in a Court of Equity. This subject will be presently discussed;[3] but here it will suffice to observe that whatever is in the nature of a *fishing* application will be strenuously resisted. If therefore the applicant is merely seeking inspection for the purpose of discovering either what the adversary's case is, or in what manner it is intended to be supported, or how a flaw can be detected in it, he will inevitably fail.[4]

§ 1600. Still it is not necessary that the inspection should be demanded exclusively with the view of establishing the original case of the applicant; but the Court will entertain the motion, if the object be to obtain material evidence to answer the opponent's case. Where, therefore, to an action of detinue for a deed the defendant had pleaded a general lien for work done by him as attorney for plaintiff, the plaintiff, on an affidavit stating that he had never retained the defendant, and that the bill of costs was due not from himself, but from a third party whom he named, was permitted to inspect such entries in the attorney's books as related to the costs in question.[5] So, where in an action by an architect to recover his commission for superintending the erection of certain buildings for defendant, the affidavit, in support of an application to inspect the plaintiff's day-book or journal, alleged that the work was never done; and that, if done, the charge was excessive; the Court held that the defendant was entitled to an

[1] Pepper *v.* Chambers, 7 Ex. R. 226.

[2] Sneider *v.* Mangino, 7 Ex. R. 229.

[3] Post, § 1603, et seq.

[4] Scott *v.* Walker, 2 E. & B. 560, per Lord Campbell; Sneider *v.* Mangino, 7 Ex. R. 229; Hunt *v.* Hewitt, id. 244; Wright *v.* Morrey, 11 Ex. R. 209.

[5] Scott *v.* Walker, 2 E. & B. 555. See also Rayner *v.* Allhusen, 2 L. M. & P. 695, per Erle, J.; and Galsworthy *v.* Norman, 21 L. J., Q. B., 70, per id.

inspection, to see if there were any entries relating to the work, and what price was therein charged.[1]

§ 1601. In the case of Doe v. Langford[2] the facts were these:—The defendant, being a freeholder of certain premises, was also assignee of a lease of other adjoining premises, the reversion of which was in the lessor of the plaintiff. A dispute arose respecting the boundary of the two properties, and ejectment was brought, at the expiration of the lease, to recover a plot of land which the lessor of the plaintiff alleged was parcel of the leasehold, but which the defendant claimed as his freehold. The lessor of the plaintiff thereupon applied to the Court for leave to inspect the lease, as he had no counterpart of it, the assignment of the lease, and the conveyance of the freehold; but Mr. Justice Erle, while he granted so much of the application as related to the lease and assignment, refused to make any order with respect to the conveyance, as that deed could not in any way prove the title of the applicant to the land which he sought to recover. In the case of Hill v. Philp,[3] a question arose as to whether certain documents were privileged from inspection. There an action was brought against the keeper of a lunatic asylum for improper treatment of a lunatic, and the plaintiff sought to inspect the books kept by the defendant as required by the Act of 8 & 9 Vict., c. 100,—the defendant's licence,—the order and medical certificates under which the plaintiff was confined,—and all letters written either by the plaintiff's wife, or by the commissioners of lunacy, to the defendant relating to the plaintiff. The application was resisted on the fourfold ground, 1, that it was contrary to public policy to allow the inspection; 2, that the documents were strictly confidential; 3, that, if produced, they might subject the defendant to an indictment, and self-crimination could not be enforced; and, 4, that it did not appear in what way they could be material in support of the plaintiff's case. The Court very properly overruled all these objections, and ordered the inspection as prayed.

[1] Hunt v. Hewitt, 7 Ex. R. 236. See Riccard v. Inclosure Commis. 4 E. & B. 329. [2] 1 Bail Ct. Cas. 37, per Erle, J.; 21 L. J., Q. B., 217, S. C. [3] 7 Ex. R. 232.

§ 1602. As no provision is made in either statute respecting the *place* in which documents are to be inspected, the applicant, if he wishes any place to be specially appointed, must have it named in the rule or order.[1] The costs of the inspection must be paid by the party seeking it; but the costs of the application will in general be regarded as costs in the cause.[2]

§ 1603. Such being the principal cases which have been decided by the courts of common law with respect to the discovery and inspection of documents, it remains to be seen under what circumstances a *Court* of *Equity* will enforce the production of papers. And here it may be generally observed, that, while courts of equity recognise no distinction between public and private documents, or between deeds and other less formal writings,[3] they will compel discovery in aid of *civil rights only:* and therefore, unless the defendant waives the objection to their authority, they will never enforce an inspection of documents to aid either the prosecution of, or the defence to, an indictment or information.[4] Neither will a court of equity interfere, any more than a court of law, where the discovery sought would subject the defendant to any criminal proceeding, penalty, or forfeiture,[5] or would violate the rules which relate to professional privilege.[6] Subject to these exceptions, any party to an action at law, whether he be plaintiff or defendant,[7] is entitled in equity to exact from his opponent a discovery of the evidences, and therefore to inspect and take copies of the writings, which relate either to his case alone,[8] or to his case as well as to that of his opponent.[9] He is also entitled to a discovery of everything which

[1] Rogers *v.* Turner, 21 L. J., Ex., 8.

[2] Hill *v.* Philp, 7 Ex. R. 232.

[3] Wigram on Disc. § 400.

[4] Lord Montague *v.* Dudman, 2 Ves. Sen. 397, per Lord Hardwicke; Glyn *v.* Houston, 1 Keen, 329; Macaulay *v.* Shackell, 1 Bligh, N. S. 126, et seq., per Lord Eldon; Wigram on Disc., § 10; ante, § 1351.

[5] Ante, §§ 1308—1312, 1318; Wigram on Disc., §§ 127—147, 442.

[6] Ante, § 832, et seq. Wigram on Disc., §§ 136—138, 442.

[7] Wigram on Disc., § 87.

[8] Wigram on Disc., §§ 23, 26, 284.

[9] Smith *v.* Duke of Beaufort, 1 Hare, 520; 1 Phill. 220, S. C.; Burrell *v.* Nicholson, 1 Myl. & K. 680; Earp *v.* Lloyd, 3 Kay & J. 549; Bolton *v.* Corp. of Liverpool, 1 Myl. and K. 88; Att.-Gen. *v.* Lambe, 3 Y. & Coll.,

may enable him to defeat the case or title which he expects his opponent will set up;[1] and he has a further right to know what that case or title is;[2] but still he has no right whatever to a discovery of the evidences, or to an inspection of the writings, which either relate exclusively to his adversary's case,[3] or are not material to the issues about to be tried at law.[4]

§ 1604. The *mode of obtaining the inspection required* when a bill of discovery is filed, is well explained by Vice-Chancellor Wigram.[5] "The plaintiff alleges in his bill (in effect), that the defendant has in his possession or power, deeds, papers, and writings *relating* to the matters mentioned in the bill; and that, by the contents of such deeds, papers, and writings, if the same were produced, the truth of the plaintiff's case would appear. The defendant is then required by the bill to admit or deny the truth of these allegations; if he admits having possession or power over any such deeds, documents, or writings, he is required by the bill, and is primâ facie bound, to describe them, either in the body of his answer, or in the schedule to it. The plaintiff then moves the Court that the defendant may be ordered to produce and leave in the" Record and Writ Office[6] "the deeds, papers, and writings so described, with liberty for the plaintiff to inspect them and take copies thereof." Though this mode of proceeding has of late years been substituted for the more cumbrous course of requiring the defendant to set out the contents of the documents in his answer, the orders for production still rest upon the principle that the documents are *part* of

Ex. R., 162; Wigram on Disc., §§ 325, 367; Combe *v.* Corp. of London, 1 Y. & Coll. C. C. 631; 15 L. J., Ch., 80, S. C.; Att.-Gen. *v.* Thompson, 8 Hare, 106; Stainton *v.* Chadwick, 3 M. & Gord. 575; 13 Beav. 320, S. C. See Gomm *v.* Parrott, 26 L. J., C. P., 279.

[1] Att.-Gen. *v.* Corp. of London, 2 Hall & T. 1, 11—18; 2 M. & Gord. 247; 12 Beav. 8, S. C.; Stainton *v.* Chadwick, 3 M. & Gord. 575; 13 Beav. 320, S. C.

[2] Id.

[3] Bolton *v.* Corp. of Liverpool, 1 Myl. & K. 88; 3 Sim. 467, S. C; Smith *v.* Duke of Beaufort, 1 Hare, 520; 1 Phill. 220, 221, S. C.; Glover *v.* Hall, 2 Phill. 484.

[4] Wigram on Disc., §§ 224—237.

[5] Wigram on Disc., § 285.

[6] Gen. Ord. 57, 16th Oct. 1852.

the defendant's compulsory *examination;* and consequently, at the trial at law, the plaintiff cannot read the writings produced without putting in the entire answer of the defendant, and thus affording him the benefit of any explanation he may have given respecting them.[1]

§ 1605. As in all cases where a discovery of the contents of papers is prayed, the *onus* is upon the plaintiff to prove his right thereto, and the only evidence on which he can rely is the defendant's *admission;*[2] it follows that, with a single exception to be presently mentioned,[3] a court of equity will not make an order for inspection of documents, unless the plaintiff can show from the defendant's *answer,*[4] or from his *affidavit* in the nature of a supplemental answer,[5] first, that the writings in question are in the *possession* or power of the defendant;[6] and next, that they are *relevant* to his own case,[7] or, in other words, that he has an *interest* in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him,[8] or as tending to disprove the title or case of his opponent, by showing some specific defect therein.[9]

§ 1606. The exception just alluded to is recognised where the defendant, admitting the documents to be in his possession, so

[1] Smith *v.* Duke of Beaufort, 1 Hare, 524; Brown *v.* Thornton, 1 Myl. & Cr. 243; Miller *v.* Gow, 1 You. & Coll. C. C. 56; Wigram on Disc., § 285.

[2] Wigram on Disc., § 293; Storey *v.* Lord George Lennox, 1 Myl. & Cr. 534.

[3] § 1606. [4] Wigram on Disc., § 294.

[5] Wigram on Disc., § 293. As to these affidavits, see Llewellyn *v.* Badeley, 1 Hare, 527, and cases there cited; Morrice *v.* Swaby, 2 Beav. 500; Gardner *v.* Dangerfield, 5 Beav. 389.

[6] Wigram on Disc., § 294. See Burbidge *v.* Robinson, 2 M. & Gord. 244; Reynell *v.* Sprye, 21 L. J., Ch., 13.

[7] Wigram on Disc., §§ 299—301; Glover *v.* Hall, 2 Phill. 484; Peile *v.* Stoddart, 1 Hall & T. 207.

[8] Wigram on Disc., § 295; Wright *v.* Vernon, 1 Drew. 344; Hambrook *v.* Smith, 17 Sim. 209.

[9] Smith *v.* Duke of Beaufort, 1 Phill. 209; 1 Hare, 507, S. C.; Stainton *v.* Chadwick, 3 M. & Gord. 575; 13 Beav. 320, S. C.; Glasscott *v.* Copper Miners' Co., 11 Sim. 305; Combe *v.* Corp. of London, 1 You. & Coll. C. C. 631; 15 L. J., Ch., 80, S. C.; Harris *v.* Harris, 4 Hare, 179.

incorporates them by general or special reference with his answer, as to make them form a substantial part of it. In this case the plaintiff will be entitled to their production, whether they constitute his title or the exclusive title of the defendant; because the latter, by thus dealing with the documents, will be held to have waived any objection to their production; and this, too, although in a subsequent part of his answer he should expressly claim the privilege of withholding them, either as forming no part of his opponent's case, or as confidential communications.[1] The same doctrine would apply, if a petitioner were to refer in his petition to a document in his possession.[2] In short, neither party to a suit will be allowed to set out a document in part and then refer to it, and afterwards to tell his opponent that he shall not see it, because he himself was not bound originally to furnish any information respecting it. Either he must abstain from referring to any part of it, or he must permit his opponent to examine every part. He cannot after a general reference turn round, and say, "I told you something I was not bound to tell you; I will now claim my privilege, and tell you no more."[3]

§ 1607. Though all documents will be considered as being in the defendant's power, which he admits to be in the hands of his *agent*, or of any other person under his *control*,[4] the Court will not in general order the production of papers, where it appears by the defendant's answer, that he has a *joint* possession of them with somebody else who is not before the Court,[5] and who has an

[1] Hardman *v.* Ellames, 2 Myl. & K. 732, 745; Macintosh *v.* Great Western Rail. Co., 18 L. J., Ch., 169.

[2] Peyton *v.* Lambert, 6 Ir. Eq. R., N. S., 9.

[3] Macintosh *v.* Great Western Rail. Co., 18 L. J., Ch., 170, per Lord Cottenham. See ante, § 1319.

[4] Wigram on Disc., § 294; Ex parte Shaw, Jacob, 272; Morrice *v.* Swaby, 2 Beav. 500; Rodick *v.* Gandell, 10 Beav. 270; Palmer *v.* Wright, id. 234; Monsel *v.* Lindsay, 13 Ir. Eq. R. 144. Documents pledged by the defendant are not under his control, Liddell *v.* Norton, 1 Kay, app. xi. See ante, § 1591.

[5] Murray *v.* Walter, Cr. & Ph. 114, 124, 125, per Lord Cottenham; Taylor *v.* Rundell, Cr. & Ph. 111, per id.; Reid *v.* Langlois, 1 M. & Gord. 627, 635—638, per id.; 2 Hall & T. 59, 69—72, S. C.; Morrell *v.*

interest in them distinct from his own;[1] but in these cases, the plaintiff must either make all the persons interested parties to the suit,[2] or he may compel the defendant to furnish in his answer a full discovery of the contents of these documents;[3] and should he adopt this latter course, and should the papers be in the custody of some one who holds them for the defendant and the other persons interested, the defendant must still answer the interrogatories respecting their contents; for every defendant is bound to inspect, and answer as to the contents of, all documents that are in his possession or power; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power*.[4] It may further be observed, that no valid objection can be taken to an order for the production of memoranda, which are admitted by the defendant to relate to the matters in dispute, and to be in his possession, on the ground that they are intermingled with other entries in the same book, to a discovery of which the plaintiff is not entitled, and which cannot be separated or sealed up.[5]

§ 1608. Independent of bills of discovery, courts of equity have, since 1852, adopted a summary mode of proceeding for enforcing the production of documents. The new practice is regulated by §§ 18 and 20 of the Chancery Procedure Amendment Act.[6] § 18 enacts, that "it shall be lawful for the Court, upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim,—and, as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents,—to make an order for the production

Wootten, 13 Beav. 105; Lopez *v.* Deacon, 6 Beav. 254; Penney *v.* Goode, 1 Drew. 474; Wigram on Disc., § 294.

[1] Glyn *v.* Caulfeild, 3 M. & Gord. 463; Few *v.* Guppy, 11 Beav. 457.

[2] Lopez *v.* Deacon, 6 Beav. 258, per Lord Langdale; Wigram on Disc., §§ 294, 327.

[3] Lopez *v.* Deacon, 6 Beav. 258; Taylor *v.* Rundell, 1 Phill. 222.

[4] Taylor *v.* Rundell, 1 Phill. 226, per Lord Lyndhurst.

[5] Carew *v.* White, 5 Beav. 172. Those who wish for more detailed information respecting bills of discovery are referred to Vice-Chancellor Wigram's able treatise on that subject.

[6] 15 & 16 Vict., c. 86.

by any defendant upon oath, of such of the documents in his possession or power relating to matters in question in the suit as the Court shall think fit; and the Court may deal with such documents when produced, in such manner as shall appear just."[1] § 20 enacts, that "it shall be lawful for the Court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the Court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

§ 1609. The above statutory provisions make no alteration in the ancient rule in equity, which requires that every party, whether plaintiff or defendant, who seeks to enforce the production of documents, must rest his application on the sworn admission of his adversary, that the documents in question are either in his custody or under his control.[2] A plaintiff, therefore, cannot obtain an order for production, on his own affidavit that the document required is in the defendant's possession, if the defendant does not himself admit, on oath, that such is the case.[3] When the suit is commenced by bill, an order upon the plaintiff to produce documents may be made under § 20 of the Act at any time after the answer has been put in, and though the period of six weeks allowed for excepting to the answer has not expired; but if the summons is taken out very soon after the filing of the answer, the Court will give time to the plaintiff to ascertain whether the answer is sufficient.[4] All applications under the Act should be made, in the first instance, to a judge at chambers;[5]

[1] See ante, p. 1030, n. 2.
[2] Lamb *v.* Orton, 22 L. J., Ch., 713, per Kindersley, V.-C.
[3] Id.
[4] Walker *v.* Kennedy, 26 L. J., Ch., 397, per Kindersley, V.-C.
[5] Thompson *v.* Teulon, 9 Hare, app. xlviii. & xlix.

and no affidavit is necessary in support of the motion. The judges, however, have settled a form of affidavit to be made by the opponent.[1]

§ 1610. The practice in Ireland with respect to enforcing the production and inspection of documents is regulated in part by § 6 of Lord Brougham's Act of 1851, which has been already discussed,[2] and in part by § 64 of the Act of 16 & 17 Vict., c. 113. This section enacts, that "when any party shall rely on any deed or document, or any portion thereof, in his pleading, the said deed or document shall be produced upon every trial and argument in the cause, unless its nonproduction can be satisfactorily excused; and in default thereof, it shall be lawful for the Court or judge before whom such trial or argument shall be had, to exclude the said party so in default from all benefit or advantage of the said deed or document, or to make such order for the postponement of the trial or argument, and the payment of the costs occasioned by the said postponement, as shall seem to be just; and the opposite party shall be at liberty, by notice in writing, to demand of the party so relying on the said deed or document an inspection or copy, or both an inspection and copy of the same, including the names of the witnesses by whom it was attested, if any, and any indorsement or defeasance thereon, and the production of it for the purpose of its being stamped, if necessary, and also the production, inspection, or copy of any other deed or instrument whereof inspection could be obtained by a bill of discovery; and such copy when furnished, shall be certified to be a correct copy by the attorney furnishing the same; and in case such copy shall not be delivered, or such inspection or production shall not be granted, the party demanding the same shall be at liberty to apply to the Court or judge for an order for such copy or inspection or production, or copy and inspection and production, as such judge shall think fit, but such demand, notice, or order, shall in no case

[1] Rochdale Can. Co. v. King, 15 Beav. 11. See M'Intosh v. Great West. Rail. Co., 1 Sm. & Gif. 4; Wing v. Harvey, 1 Sm. & Gif., app. x.
[2] Ante, § 1595.

operate as a stay of proceedings, except when a special order shall be made by a judge to that effect."

§ 1610 A. The statutes recently passed for amending the laws relating to probates, whether in England or in Ireland, respectively contain important provisions for the purpose of enforcing the production of testamentary instruments. § 26 of the English Act,[1] and § 31 of the Irish Act,[2] severally enact, that "the Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with repect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court."[3]

§ 1611. The County Courts possess an *indirect* power of com-

[1] 20 & 21 Vict., c. 77.

[2] 20 & 21 Vict., c. 79, Ir.

[3] Applications under the above enactment "may be made to the judge, on motion or petition, or by summons served on the opposite party in any suit, and upon motion and affidavit in cases where no suit is pending." Reg. 31 of Rules for Ct. of Prob. in contentious business, and Forms of subpœnas applicable to these cases, which are there given, Nos. 22, 23, 24, and 25.

pelling any party to an action in those courts to allow any written instrument, which is in his possession, to be inspected by his opponent, provided such opponent can show that he has an interest in the document. This power is conferred by rule 63 of the Practice Regulations, which provides, that "where in any action, the plaintiff or defendant is desirous of inspecting any written or printed document or instrument, in which he *has an interest*, and to the production of which he is entitled for the purposes of the action, and which shall be in the possession or power, or under the control, of the other party, such plaintiff or defendant may, five clear days before the day of hearing, give notice to the other party by post or otherwise, that he or his attorney desires to inspect such document or instrument, describing the same, at any place to be appointed by the other party; and if such other party shall neglect or refuse to appoint such place, or to allow such plaintiff or defendant or his attorney to inspect such document or instrument within three days after receiving such notice, the judge may, in his discretion, on the day of hearing, adjourn the cause, and make such order as to costs as he shall think fit."

§ 1612. In some few cases facility is given for the inspection of private documents by the express provisions of statutes. Thus, by § 5 of the Act of 53 Geo. 3, c. 141, persons liable to pay annuities or rent-charges, certain particulars of which were, prior to the 10th of August, 1854,[1] required to be enrolled in Chancery,[2] may obtain a copy of any deed, bond, instrument, or other assurance, whereby the annuity or rent-charge was granted, by giving twenty-one days' notice in writing to the person entitled to such annuity, or rent-charge, and by paying a reasonable sum for such copy; and the holder of the original instruments is directed to allow the person to whom such copies shall be sent, to examine them with the originals; and, in the event of the payee of the annuity or rent-charge, or the holder of the original instruments, refusing to comply with these provisions, application may be made to any judge of the Queen's Bench or Common Pleas, who will

[1] When 17 & 18 Vict., c. 90, which repeals the Acts relating to the Enrolment of Annuities, was passed. [2] See ante, § 1027, 1028 A.

thereupon make such order as he may think proper. So, under § 9 of the Act of 7 Geo. 2, c. 8, every stockbroker is required to keep a book and enter therein all contracts, &c., which he shall make from time to time between other parties in buying or selling stock, to the intent that such broker shall produce such book, "when thereunto lawfully required." The meaning of this enactment seems to be, not that the broker is compellable to produce his book to a mere stranger, but that he may be forced to produce it to be inspected by his principals. Therefore, where a broker brought an action as indorsee of a bill of exchange against the acceptor, and the defence was that the bill was accepted for the accommodation of the drawer, who had indorsed it to the plaintiff in payment of moneys due on time bargains for stock, the Court refused to compel the plaintiff to produce his book in order to enable the defendant to plead and prove these facts. They held that the defendant had no legal interest in the book, and that it was contrary to sound principles of justice to oblige a party to supply evidence which might criminate himself.[1]

§ 1613. With respect to the *production* of documents at the trial little need here be said; for since parol evidence of the contents of writings cannot be given as primary proof, the party who relies upon a document must either produce it, or give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence.[2] If, therefore, the paper be lost or destroyed, or if its production be physically impossible or highly inconvenient, the particular fact relied on must be proved;[3] if it be in the custody of a stranger, he must be served with a writ of subpœna duces tecum;[4] and if it be in the hands or power of the adverse party, the practice in general is to give him or his attorney a regular notice to produce it at the trial.[5] Not that, on proof of such notice, the adversary is compellable to furnish evidence against himself; but the notice is given, as has

[1] Pritchett *v.* Smart, 7 Com. B. 625; 6 Dowl. & L. 702, S. C.

[2] Ante, § 398. As to the effect of producing a document to a witness under cross-examination, see ante, §§ 1270, 1301, 1307.

[3] Ante, §§ 398, 399, 408.

[4] Ante, § 427.

[5] Ante, § 410, et seq.

been before explained, to lay a foundation for the introduction of secondary evidence of the contents of the document, by showing that the party has done all in his power to insure the production of the original.

§ 1614.[1] Where notice has been given to the opponent to produce papers in his possession or power, the *regular time for calling for their production* is not until the party who requires them has entered upon his case; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable.[2] Still, it is considered rigorous to insist upon this rule, and as a close adherence to it would be productive of inconvenience, the judges are very unwilling to enforce it.[3] The production of papers upon notice does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence,[4] at least if they be in any way material to the issue.[5] The reason for this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

§ 1615. If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind; and, therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness.[6] Neither, after such

[1] Gr. Ev., § 563, in part.

[2] Graham v. Dyster, 2 Stark. R. 23.

[3] Sideways v. Dyson, 2 Stark. R. 49; Calvert v. Flower, 7 C. & P. 386, per Lord Denman.

[4] Calvert v. Flower, 7 C. & P. 386; Wharam v. Routledge, 5 Esp. 235, per Lord Ellenborough.

[5] Wilson v. Bowie, 1 C. & P. 10, per Park, J. See Sayer v. Kitchen, 1 Esp. 210.

[6] Edmonds v. Challis, 7 Com. B. 413, 439; 6 Dowl. & L. 581, 596 S. C.; Jackson v. Allen, 3 Stark. R. 74.

refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination,[1] or to produce and prove it as part of his own case.[2] The same rule prevails where a party determines upon keeping back a chattel, when called upon under notice to produce it.[3]

§ 1616.[4] If the instrument, on its production, appears to have been *altered*, it is a general rule that *the party offering it* in evidence *must explain* this appearance, *if he be called upon to do so by the issue raised,*[5] and *if the instrument be not admitted by his opponent under notice;*[6] because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion.[7] If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored.[8] It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contempo-

[1] Doe *v.* Cockell, 6 C. & P. 527, 528, per Alderson, B.

[2] Doe *v.* Hodgson, 12 A. & E. 135; 2 M. & Rob. 283, S. C.

[3] Lewis *v.* Hartley, 7 C. & P. 405, per Lord Abinger. There notice was given to produce a dog for the purpose of identification.

[4] Gr. Ev., § 564, in part.

[5] Parry *v.* Nicholson, 13 M. & W. 779, per Parke, B.; ante, §§ 264, 269, post, § 1635.

[6] Freeman *v.* Steggal, 14 Q. B. 202; ante, § 704.

[7] Henman *v.* Dickinson, 5 Bing. 183; 2 M. & Pay. 289, S. C.; Clifford *v.* Parker, 2 M. & Gr. 910; London & Brighton Railway Co. *v.* Fairclough, id. 705, per Tindal, C. J.; Earl of Falmouth *v.* Roberts, 9 M. & W. 471.

[8] With respect to some few instruments the Legislature has expressly declared that all alterations made therein shall be void unless they be duly attested. Thus, the Merchant Shipping Act of 1854, 17 & 18 Vict., c. 104, enacts in § 163, that, "Every erasure, interlineation, or alteration in any such agreement with seamen as is required by the third part of this Act (except additions so made as hereinbefore directed for shipping substitutes or persons engaged subsequently to the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in such erasure, interlineation, or alteration, by the written attestation (if made in her Majesty's dominions) of some shipping master, justice, officer of customs, or other public functionary, or (if made out of her Majesty's dominions) of a British consular officer, or, where there is no such officer, of two respectable British merchants."

raneously with the execution of the instrument;[1] and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof.[2] Indeed, it may be laid down as a general rule, that wherever it is an offence to alter a document after it has been completed, the law presumes, primâ facie, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence.[3] With respect, however, to a bill of exchange, or a promissory note, the law presumes nothing,[4] but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made.[5] These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof.[6]

§ 1617. The rule of law applicable to this subject is, that any *material alteration* in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps, also, with this additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it.[7]

[1] Trowel v. Castle, 1 Keb. 22. As to alterations in wills, see ante, § 134.

[2] Doe v. Catomore, 16 Q. B. 745; Simmonds v. Rudall, 1 Sim. N. S. 136, per Lord Cranworth.

[3] R. v. Gordon, 1 Pearce & Dears. C. C. 586, 591. There an affidavit was produced with an interlineation on it.

[4] Johnson v. Duke of Marlborough, 2 Stark. R. 278, per Abbott, J.

[5] Bishop v. Chambre, M. & M. 116; 3 C. & P. 55, S. C.; Taylor v. Mosely, 6 C. & P. 273; Cariss v. Tattersall, 2 M. & Gr. 890. All these questions are of course determined in the first instance by the Court, when they are raised upon a preliminary objection to the admissibility of the instrument; but they are again open to the jury. Ross v. Gould, 5 Greenl. 204.

[6] Knight v. Clements, 8 A. & E. 215; 3 N. & Per. 375, S. C.; Clifford v. Parker, 2 M. & Gr. 909; Byrom v. Thompson, 11 A. & E. 33.

[7] Davidson v. Cooper, 11 M. & W. 778, 799, 802; 13 M. & W. 343, S. C. by Ex. Ch. See post, §§ 1624—1626.

This rule, which was originally propounded with respect to deeds,[1] probably because, in former days, most written engagements were drawn in that form,[2] has since been extended to negociable securities,[3] bought and sold notes,[4] guarantees,[5] and policies of assurance;[6] and may now be said to apply equally to all written instruments, which constitute the evidence of contracts.[7]

§ 1618.[8] The grounds of this doctrine are twofold. The first is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud, without running any risk of losing by the event in case of detection.[9] The other is, to insure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned.[10] Besides these grounds, which are common to all altered written instruments, a third reason for the rule, chiefly as it applies to bills of exchange and promissory notes, may be found in the necessity which obtains for protecting the revenue arising from the stamp laws;[11] but with respect to these laws, it should be observed, that it is immaterial whether the alteration were made with or without the consent of the parties to the instrument.[12]

§ 1619. In saying that an instrument will be rendered void by any *material* alteration, indefinite language is of necessity employed, but a short reference to some of the leading cases on

[1] Pigot's case, 11 Rep. 27.
[2] Master *v.* Miller, 4 T. R. 330, per Lord Kenyon.
[3] Id.; 2 H. Bl. 141, S. C. in error.
[4] Powell *v.* Divett, 15 East, 29; Mollett *v.* Wackerbarth, 5 Com. B. 181.
[5] Davidson *v.* Cooper, 11 M. & W. 778.
[6] Forshaw *v.* Chabert, 3 B. & B. 158; 6 Moore, 369, S. C.; Fairlie *v.* Christie, 7 Taunt. 416; 1 Moore, 114; Holt, N. P. R. 331, S. C.; Campbell *v.* Christie, 2 Stark. R. 64, per Lord Ellenborough.
[7] Davidson *v.* Cooper, 11 M. & W. 802.
[8] Gr. Ev., § 565, as to first six lines.
[9] Master *v.* Miller, 4 T. R. 329, per Lord Kenyon.
[10] Sanderson *v.* Symonds, 1 B. & B. 430, per Dallas, C. J.
[11] Mason *v.* Bradley, 11 M. & W. 594, per Parke, B.; Davidson *v.* Cooper, id. 787, per id.
[12] Bowman *v.* Nichol, 5 T. R. 537.

this subject will serve, in a great measure, to explain what constitutes materiality. Thus, any alteration in negociable securities, as to the date,[1] amount, or time of payment;[2] the addition of a claim for a specific rate of interest;[3] the insertion of words to limit or vary the consideration as originally expressed;[4] the introduction of a place for payment, though the acceptance still remains a general acceptance;[5] the substitution of one place for another;[6] the converting a joint, into a joint and several, responsibility;[7] the affixing an additional maker's name to a joint and several note after it has issued;[8] or, it seems, the cutting off the signature of one of several co-promisers in a joint and several note;[9]—will, at common law, as against any party *not consenting* thereto, invalidate the instrument, even in the hands of an innocent holder; and will for the most part prove equally fatal, by virtue of the stamp laws, though made by consent of all parties.[10] So, where a sold note was altered, without the knowledge of the purchaser, by inserting an additional term into the contract,[11] —and where an agreement was apparently converted into a deed,

[1] Outhwaite *v.* Luntley, 4 Camp. 179, per Lord Ellenborough; Walton *v.* Hastings, id. 223; 1 Stark. R. 215, S. C., per id.; Cardwell *v.* Martin, 9 East, 180; Master *v.* Miller, 4 T. R. 320; 2 H. Bl. 140, S. C.

[2] Bowman *v.* Nichol, 5 T. R. 537; Alderson *v.* Langdale, 3 B. & Ad. 660.

[3] Warrington *v.* Early, 2 E. & B. 763.

[4] Knill *v.* Williams, 10 East, 431.

[5] Macintosh *v.* Haydon, Ry. & M. 362, per Abbott, C. J.; Burchfield *v.* Moore, 3 E. & B. 683; Desbrowe *v.* Wetherby, 1 M. & Rob. 438, per Tindal, C. J., S. C. nom. Desbrow *v.* Weatherley, 6 C. & P. 758; Taylor *v.* Moseley, 1 M. & Rob. 439, n. per Lord Lyndhurst, C. B.; 6 C. & P. 273, S. C.; Crotty *v.* Hodges, 4 M. & Gr. 561; 5 Scott, N. R. 221, S. C.; Cowie *v.* Halsall, 4 B. & A. 197; 3 Stark. R. 36, S. C. See 1 & 2 Geo. 4, c. 78.

[6] Tidmarsh *v.* Grover, 1 M. & Sel. 735; R. *v.* Treble, 2 Taunt. 329; R. & R. 164, S. C.

[7] Perring *v.* Hone, 4 Bing. 28; 12 Moore, 135; 2 C. & P. 401, S. C.

[8] Gardner *v.* Walsh, 5 E. & B. 83; overruling Catton *v.* Simpson, 8 A. & E. 136; 3 N. & P. 248, S. C. See Gould *v.* Coombs, 1 Com. B. 543.

[9] Mason *v.* Bradley, 11 M. & W. 590. See Nicholson *v.* Revill, 4 A. & E. 675; 6 N. & M. 192, S. C. The removing, however, of the seal of one of several obligors does not, in the case of a *several* bond, render it void as to the others. Collins *v.* Prosser, 1 B. & C. 682; 3 D. & R. 112, S. C.

[10] Chit. on Bills, 181—185; 1 Smith's Lead. Cas. 490.

[11] Powell *v.* Divett, 15 East, 29; Mollett *v.* Wackerbarth, 5 Com. B. 181.

by affixing seals to the signatures of the parties,[1]—the respective instruments were held to be vitiated; and, in short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material.

§ 1620. On the other hand, the insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error,[2] will not constitute a material alteration, even though made without consent; neither will an instrument be avoided by virtue of the stamp laws, though it be altered after execution in a material particular, provided the parties agree to make such alteration, in order to correct a mistake, and in furtherance of their original intention. Thus, where, subsequent to the execution of a policy, the insured inserted some words which gave him no power to do any one thing which he could not have done under the policy as it originally stood, the Court held that the instrument was not vacated;[3] and the insertion or alteration of a place for payment in a bill of exchange, though made after its acceptance, will not invalidate the instrument, at least as against the acceptor, provided the words be added or altered by the acceptor, or with his consent.[4] So, filling in the date of a warrant of attorney after execution, will not avoid the instrument, for the parties must clearly have intended that the date should be inserted.[5] So, in a bond conditioned for the payment of 100*l.*, where the word "hundred" had been accidentally omitted in the second place in which the sum was mentioned, its insertion by a stranger was held to be immaterial;[6] and where, in a note intended to be negociable, the words "or order" had been left out by mistake, their insertion by the holder, with the consent of the maker, was

[1] Davidson *v.* Cooper, 11 M. & W. 784; 13 M. & W. 353, S. C., in Ex. Ch.
[2] See Bluck *v.* Gompertz, 7 Ex. R. 862.
[3] Sanderson *v.* Symonds, 1 B. & B. 426; 4 Moore, 42, S. C.; Clapham *v.* Cologan, 3 Camp. 382, per Lord Ellenborough.
[4] Walter *v.* Cubley, 2 Cr. & Mee. 151; Stevens *v.* Lloyd, M. & M. 292, per Lord Tenterden; Jacob *v.* Hart, 6 M. & Sel. 142.
[5] Keane *v.* Smallbone, 17 Com. B. 179.
[6] Waugh *v.* Bussell, 5 Taunt. 707.

held neither to vitiate the instrument nor to render a new stamp necessary.[1]

§ 1621. It is not, however, on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only on those occasions, when he is *seeking to enforce it, or claiming an interest under it.* The extent and meaning of this rule may be well illustrated by the following cases. A party became tenant of a farm from year to year, and subsequently signed an agreement respecting the mode of tillage. His landlord brought an action for not cultivating the land according to the terms of the agreement, and the instrument, when produced, contained an erasure in the habendum, the term of years being altered from seven to fourteen. The Court decided that the landlord was not bound to explain this alteration, because the tenant held the farm under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, and consequently it was quite immaterial whether seven or fourteen years were mentioned in that instrument. The simple contract which the parties had entered into was that the tenant should farm the land according to certain written stipulations. "The rule of law," said Mr. Baron Parke, "applies where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the term of years is wholly immaterial."[2]

§ 1622. So, in the case of Hutchins *v.* Scott,[3] which was an

[1] Byrom *v.* Thompson, 11 A. & E. 31; Kershaw *v.* Cox, 3 Esp. 246; Hamelin *v.* Bruck, 9 Q. B. 306; Jacob *v.* Hart, 6 M. & Sel. 142; Brutt *v.* Picard, Ry. & M. 37; Robinson *v.* Touray, 1 M. & Sel. 217; Farquhar *v.* Southey, M. & M. 14; Eagleton *v.* Gutteridge, 11 M. & W. 465. For American cases connected with this subject, see Hunt *v.* Adams, 6 Mass. 519, 522; Smith *v.* Crooker, 5 Mass. 538; Hale *v.* Russ, 1 Greenl. 335; Knapp *v.* Maltby, 13 Wend. 587; Brown *v.* Pinkham, 18 Pick. 172.

[2] Earl of Falmouth *v.* Roberts, 9 M. & W. 471.

[3] 2 M. & W. 809.

action for an excessive distress, the plaintiff, in order to prove the amount of rent really due, put in the agreement for the lease of a house, No. 35, which was in fact the house occupied by him. The number originally inserted in the instrument was 38, and the jury found that this had been altered to 35 after the execution of the agreement, and without the defendant's knowledge. The Court held that, as the demise was admitted on the record, the altered agreement might be given in evidence to show the terms of the holding. "I do not think," said Lord Abinger, "when the case is rightly understood, that the question arises, whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only conseqence would be, that it would be impossible for him to maintain an action upon it as on a demise; but it is quite a different question, whether it can be given in evidence. *It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact.*[1] * * * No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws. * * Here, however, it is sufficient to decide, that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35."[2]

§ 1623. So also, a deed is not rendered inadmissible by alteration, if it be "produced merely as proof of some right or title created by, or resulting from, its *having been executed;*[3] as in the case of an ejectment to recover lands which have been conveyed by lease and release, or now by release only.[4] There, what the plaintiff is seeking to enforce is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the

[1] See also Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432.

[2] 2 M. & W. 815—817.

[3] See Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432.

[4] 4 & 5 Vict., c. 21.

effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover."[1] In like manner, if the estate lies *in grant*, as a watercourse, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.[2]

§ 1624. In the case of Davidson *v.* Cooper above cited,[3] the old doctrine, that every material alteration of an instrument, *even by a stranger*, and *without the privity of either party*, avoids that instrument, has been recognised and adopted by the Court of Exchequer, and has been held to apply in all cases *where the altered instrument is relied on as the foundation of a right sought to be enforced.*[4] The supporters of this doctrine contend that it creates no real hardship, since the party whose right of action is defeated by the alteration has his remedy by an action on the case against the spoliator;[5] but this argument is entitled to little weight, since the spoliator may either be a child, or other irresponsible agent, or be utterly incompetent to pay any damages; and if it be further urged, as was done by the judges of the Exchequer Chamber in the same case,[6] that the party who has

[1] Davidson *v.* Cooper, 11 M. & W. 800, per Lord Abinger. See also Dr. Leyfield's case, 10 Rep. 88; Bolton *v.* Bishop of Carlisle, 2 H. Bl. 259; Doe *v.* Hirst, 3 Stark. R. 60.

[2] More *v.* Salter, 3 Bulst. 79, per Coke, C. J.; Roll. R. 188; Lewis *v.* Payn, 8 Cowen, 71.

[3] Ante, § 1617.

[4] Davidson *v.* Cooper, 11 M. & W. 779, 800; Crookewit *v.* Fletcher, 26 L. J., Ex., 153.

[5] Markham *v.* Gonaston, Cro. Eliz. 626; 11 M. & W. 791.

[6] "After *much doubt*, we think the judgment (of the Court of Exchequer right. The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on the principle, that a party, *who has the custody*

the instrument in his possession is bound to take proper care of it, this at least assumes that the alteration is made while the instrument is in his custody, and consequently cannot support the broad proposition stated above. Indeed, it may perhaps be still questioned, whether the sound rule of law can be carried further than this, that any party, seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or under his control; and that unless he can establish one or other of these facts, the instrument will be vitiated.

§ 1625. However, since the case of Davidson *v.* Cooper,[1] it appears to be clearly established in England, that no party can rely on a document which has been *altered while in his custody*, though he be in a position to prove most positively, that the alteration was the effect of pure accident or mistake, or was made without his privity or consent by some person, over whom he could exercise no control. Yet this doctrine surely accords but little with common notions of justice and equity,[2] and is, moreover, scarcely consistent with several cases, decided in conformity with the custom of merchants, in which it has been held, that the cancellation by mistake of a cheque or bill does not invalidate

of an instrument made for his benefit, *is bound to preserve* it in its original state. It is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part." Per Lord Denman, in pronouncing the judgment of the Ex. Ch., 13 M. & W. 352.

[1] 11 M. & W. 778; 13 id. 343, S. C.

[2] It deserves notice that in New York the above doctrine is rejected, the law being as follows:—"The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made *by another without his concurrence*, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise." Code Civil, § 1794.

the instrument.[1] The doctrine is also opposed to the case of Lady Argoll *v.* Cheney,[2] where a deed to lead the uses of a recovery was held good, though the seals had been torn off by a little boy; and to the case of Henfree *v.* Bromley,[3] where an award was sustained, though the umpire, after it had been made, altered the amount, leaving the original sum awarded still legible. It must, however, be conceded, that these last two decisions are of less authority on this particular point, as they possibly turned on the distinction mentioned above, between an instrument constituting the foundation of a right, and that which simply furnishes evidence of some right, resulting from its execution.[4]

§ 1626. Be this as it may, it certainly deserves notice, that, according to a decision in the Irish Court of Exchequer, an instrument is not rendered void in Ireland by any alteration in it, which an unauthorised stranger may make;[5] neither, in America, is the doctrine recognised to the extent now established in England;[6] but unless some fraudulent intent be brought home to the party claiming under the instrument, the unwarranted alteration of a writing by a stranger is treated as a merely accidental spoliation, which in that country does not vitiate the instrument.[7] In the case of the United States *v.* Spalding,[8] Mr. Justice Story

[1] Raper *v.* Birkbeck, 15 East, 17; Fernandey *v.* Glynn, 1 Camp. 426; Wilkinson *v.* Johnson, 3 B. & C. 428; 5 D. & R. 403, S. C.; Novelli *v.* Rossi, 2 B. & Ad. 757; Warwick *v.* Rogers, 5 M. & Gr. 340.

[2] Palm. 402. "So in any case where the seal is torn off by accident after plea pleaded; (see 1 Roll. Rep. 40, also cited in Pigot's case, 11 Rep. 27, and Michael *v.* Scockwith, Cro. Eliz. 120, in both which cases the Court on this ground held that the mutilated instrument was the deed of the party on non est factum), and in these days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt on that point by stating the truth of the case:" per Buller, J., in Master *v.* Miller, 4 T. R. 339.

[3] 6 East, 309.

[4] See ante, § 1623.

[5] Swiney *v.* Barry, Jones, Ex. R. 109.

[6] Gr. Ev. § 566 & n. 1, in part, as to next twelve lines.

[7] Cutts *v.* U. S., 1 Gall. 69; U. S. *v.* Spalding, 2 Mason, 478; Rees *v.* Overbaugh, 6 Cowen, 746; Lewis *v.* Payn, 8 Cowen, 71; Jackson *v.* Malin, 15 Johns. 297, per Platt, J.; Nicholls *v.* Johnson, 10 Conn. 192; Marshall *v.* Gougler, 10 Serg. & R. 164.

[8] 2 Mason, 482.

strongly condemns the English doctrine, as repugnant to common sense and justice,—as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven,—and as a rule, which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what deserves no better name than a technical quibble. In these observations the American judge has been supported by Mr. Baron Alderson, who, in Hutchins *v.* Scott,[1] remarked, "It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the parties meant."

§ 1627.[2] Doubts have been strongly entertained whether an *immaterial* alteration, though made by the *obligee himself*, will avoid an instrument, provided it be done innocently, and to no injurious purpose.[3] But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important, whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule, established for the prevention of mal-practices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences.[4]

§ 1628. It has been seen that, in order to render the alteration

[1] 2 M. & W. 814. [2] Gr. Ev., § 568, almost verbatim.

[3] Sanderson *v.* Symonds, 1 B. & B. 426; Hatch *v.* Hatch, 9 Mass. 311, per Sewell, J.; Smith *v.* Dunbar, 8 Pick. 246. In Farquhar *v.* Southey, M. & M. 14, the acceptance of a bill was signed "Southey & Crowder;" the bill was originally addressed to "Messrs. Southey, Crowder, & Co.;" but the address was altered to correspond with the acceptance. Held, that this was an immaterial alteration, and that the acceptors were not discharged, per Littledale, J.

[4] Pigot's case, 11 Rep. 27; cited arguendo, in 4 T. R. 322, and 11 M. & W. 789; Shep. Touch. 68; Sanderson *v.* Symonds, 1 B. & B. 430, per Dallas, C. J. If an obligee procure a person, who was not present at the execution of the bond, to sign his name as an attesting witness, this is primâ facie evidence of fraud, and avoids the bond. Adams *v.* Frye, 3 Metc. 103.

fatal, it must be made *after the execution or other completion of the instrument.* These words are, in general, sufficiently explicit; but in two classes of cases embarrassing questions respecting their interpretation have arisen. The first class comprehends *policies of assurance, composition deeds,* and other *settlement deeds,* in which several parties with independent interests, joining to effect some general purpose, execute one common deed at different times. By considering such deeds as instruments of a peculiar nature, embracing separate contracts with different individuals, the strict rule of law has been, to a certain degree, eluded;[1] and it has been held that any alterations made during the progress of such transactions, still leave the deeds valid as to the parties previously executing them, provided such alterations have not affected the situation in which these parties stood.[2]

§ 1629. *Negociable securities* constitute the second class, respecting which little difficulty arises in regard to the time when an alteration will be deemed fatal, if made without consent; because that time is calculated from the date of the making, accepting, drawing, or indorsing of the instrument by the party against whom it is produced; but the question is, at what precise period will a bill or note be considered complete, so that any subsequent alteration, whether made with or without consent of the parties, will invalidate the instrument by reason of the *stamp laws?* In answer to this question, it may be broadly stated, that a negociable security is complete, as soon as, but not until, it becomes an *available* instrument, or, in other words, when it is in the hands of a party who can make a valid claim upon it. Thus, on the one hand, an accommodation bill may be altered after it has been drawn, accepted, and indorsed, provided it has not been passed to a bonâ fide holder for value;[3] and a bill for value,

[1] Davidson v. Cooper, 11 M. & W. 802, per Lord Abinger. See West v. Steward, 14 M. & W. 47, cited post, § 1632.

[2] Doe v. Bingham, 4 B. & A. 675, per Bayley, J., recognised in Hibblewhite v. M'Morine, 6 M. & W. 215.

[3] Downes v. Richardson, 5 B. & A. 674; 1 D. & R. 332, S. C.; Tarleton v. Shingler, 7 Com. B. 812. See Cardwell v. Martin, 9 East, 190.

if unindorsed, is not deemed complete till its acceptance;[1] nor, it seems, even then, unless it be absolutely returned to the payee.[2] On the other hand, every material alteration, whether made before or after acceptance, or with or without consent, will invalidate a bill, whether it be drawn for accommodation or for value, if it be once issued to a person who, as holder for valuable consideration, is entitled to sue any prior party thereon.[3]

§ 1630. The principles above stated with respect to negociable securities, apply equally to other instruments; and therefore where a bond, after execution, but before it had passed to the obligee, was altered, by inserting, with the consent of the parties, the name of an additional obligor, the Court held that it was not vacated, and that no new stamp was required.[4] The same point was ruled in Jones *v.* Jones,[5] where a marriage settlement had been executed by the conveying party, but, before it was executed by the other parties, or had passed into the hands of the persons who were to take under it, a clause was objected to and struck out, after which the deed was re-executed. The question in these cases is, whether, taking into consideration all the circumstances, the matter was or was not in fieri; and that, to use Mr. Preston's language, "depends on the inquiry, whether the intended grantor has given sanction to the instrument so as to make it conclusively his deed." [6]

§ 1631. Perhaps it may be stated, as a general rule, that the transaction will be deemed incomplete, and consequently that an alteration may be effected, if the deed remain in the grantor's possession, or be placed in the hands of a third party as an agent

[1] Kennerly *v.* Nash, 1 Stark. R. 452, per Lord Ellenborough.

[2] Sherrington *v.* Jermyn, 3 C. & P. 374, per Lord Tenterden.

[3] Outhwaite *v.* Luntley, 4 Camp. 179; Walton *v.* Hastings, id. 223; 1 Stark. R. 215, S. C. See further on this subject, Chitty on Bills, 186—189.

[4] Matson *v.* Booth, 5 M. & Sel. 223; see Zouch *v.* Clay, 1 Ventr. 185; 2 Keb. 872, 881; 2 Lev. 35, S. C.

[5] 1 Cr. & M. 721; 3 Tyr. 890, S. C. See also Spicer *v.* Burgess, 1 C. M. & R. 129; 4 Tyr. 598, S. C.; Murray *v.* Earl of Stair, 2 B. & C. 82; 3 D. & R. 278, S. C.; Johnson *v.* Baker, 4 B. & A. 440.

[6] 3 Prest. on Abstracts, 64.

for him, provided there be nothing to show that it was intended to operate immediately, or that it was accepted as an effectual deed by the party in whose favour it was made.[1] So, if the instrument be delivered as an *escrow*, which is not to take effect as a deed until a certain event has happened, it may be altered with impunity.[2] If, however, the *grantor has once parted with all control over the deed*, it can no longer be altered, though it has not been actually delivered to the grantee.[3] Thus, where A. executed a deed transferring certain railway shares to B., and, having received the purchase-money from B.'s brokers, delivered to them the instrument, the transaction was held to be perfected at common law, though B. had not executed the deed, and though the Railway Act directed that, on every sale of shares, the deed should be executed by both parties; and, therefore, the name of C. being afterwards substituted for B., and the deed re-executed by the seller, the Court held that it could not operate as a conveyance to C. without a fresh stamp.[4]

§ 1632. Questions of nicety have sometimes arisen respecting the validity of instruments, which have been *executed in blank*, and subsequently filled up; and distinctions have been recognised, first, between deeds and other instruments; and secondly, as to deeds, between the insertion of matter essential to their operation, and that which is not so essential. Thus, writs and

[1] See cases cited, p. 1457, n. 5.

[2] Hudson *v.* Revett, 5 Bing. 269; 2 M. & P. 663, S. C.; explained by Alderson, B., in West *v.* Steward, 14 M. & W. 49. See also cases cited, p. 1475, n. 5. The question whether a deed was executed as an escrow,—unless the point depends on documentary evidence alone,—is one for the jury, who should look to all the facts attending the execution, and who are not now bound, as formerly, to find in the negative, if no express words have been used declaratory of such an intention. Bowker *v.* Burdekin, 11 M. & W. 128, 147; Furness *v.* Meek, 27 L. J., Ex., 34. See also Gudgen *v.* Besset, 26 L. J., Q.B., 36; 6 E. & B. 986, S. C.; and ante, §§ 34, 36, and 1038.

[3] Doe *v.* Knight, 5 B. & C. 671; 8 D. & R. 348, S. C. See Richards *v.* Lewis, 11 Com. B. 1046.

[4] The London and Brighton Railway Co. *v.* Fairclough, 2 M. & Gr. 674, 705. Perhaps, if the Railway Company, who produced and relied upon the altered deed, had shown that B.'s name had originally been inserted by *mistake*, no new stamp would have been requisite. See ante, § 1620.

subpœnas may, it seems, be sealed in blank, and then filled up;[1] and an acceptance written on a blank piece of stamped paper, may be afterwards converted into a bill of exchange, to the extent of such sum as the stamp will cover.[2] As between the drawer and the acceptor, a blank acceptance must, indeed, be filled up within a reasonable time;[3] but this doctrine does not apply to a bonâ fide indorsee for value without notice, for the law presumes, with reference to him, that the drawer was invested with a general authority from the acceptor to fill up the bill at any time.[4] Again, it appears that blanks may be filled up in a deed after its execution, if the omission did not render it a nullity, and the matter inserted carries out the original intention of the grantor, or is introduced with his consent.[5] Thus, where a party, being abroad, executed a power of attorney, whereby he appointed "— Ree of Ware" his attorney, and Mr. Ree, to whom the power was delivered, and who, according to the evidence, was the party intended to be authorised by it, inserted his Christian name in the blank space, it was held that the instrument was not invalidated, though possibly some objection might have been taken with respect to the stamp laws.[6] So, where a debtor had assigned his property by deed to trustees for the benefit of his creditors, "whose names and the amount of whose debts were set out in a schedule thereunto annexed," the Court held that the deed was valid, though at the time of its execution by the debtor, no schedule was annexed, but when the deed was produced in evidence one was appended, containing the signatures of the creditors, some of which had been erased, and others had no sums set against them.[7]

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[1] See 6 M. & W. 207, arguendo.

[2] Schultz v. Astley, 2 Bing. N. C. 552, per Tindal, C. J.; Collis v. Emett, 1 H. Bl. 313; Russell v. Langstaffe, 2 Doug. 514. See Hatch v. Searles, 2 Sm. & Gif. 147.

[3] Temple v. Pullen, 8 Ex. R. 389. See Riley v. Gerrish, 9 Cush. 104.

[4] Montague v. Perkins, 22 L. J., C. P., 187. See Hatch v. Searles, 2 Sm. & Gif. 147.

[5] Markham v. Gonaston, Cro. El. 626; Moor, 547, S. C.; Zouch v. Clay, 1 Ventr. 185; 2 Keb. 872, 881; 2 Lev. 35, S. C.

[6] Eagleton v. Gutteridge, 11 M. & W. 465.

[7] West v. Steward, 14 M. & W. 47.

§ 1633. But if an instrument, at the time of its execution, was, by reason of some material deficiency, incapable of operating as a deed, it cannot afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unless such stranger be authorised by instrument under seal; for if this were permitted the principle would be violated, which requires that an attorney to execute and deliver a deed for another, must himself be appointed by deed.[1] Thus, where a proprietor of railway shares executed a conveyance of three shares with the name of the purchaser in blank, it was held that nothing passed by this deed, and that an agent appointed by parol could not afterwards, in the absence of his principal, introduce the name of a vendee;[2] and where a deed contained a covenant to deliver to the covenantee certain articles "as per schedule annexed," and the schedule was not annexed at the time of execution, the Court decided that its subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed, and consequently that the instrument was insensible and void.[3]

§ 1634. It should be observed that these last two cases turned partly on the fact that the deficiency was supplied in the absence of the granting and contracting party; and indeed, had not this been the case, the decisions would possibly have been different; for on the principle adopted in Hudson *v.* Revett,[4] if a blank in a material part of a deed be filled up after execution, and the party be present at the time and ratify the act, this will amount to evidence of re-delivery, and the deed will be held valid. In that case the defendant executed and delivered a deed conveying his property to trustees, for the benefit of his creditors, the particulars of whose demands were stated therein; but a blank was left

[1] Hibblewhite *v.* M'Morine, 6 M. & W. 214, 216, per Parke, B. See ante, § 907.

[2] Id., p. 200, overruling Texira *v.* Evans, cit. 1 Anst. 228.

[3] Weeks *v.* Maillardet, 14 East, 568, noticed by Parke, B., in 6 M. & W. 215; and in West *v.* Steward, 14 M. & W. 48. See Dyer *v.* Green, 1 Ex. R. 71; and Daines *v.* Heath, 3 Com. B. 938.

[4] 5 Bing. 269; 2 M. & P. 663, S. C.; explained by Alderson, B., in West *v.* Steward, 14 M. & W. 49.

for one of the principal debts, the exact amount of which was subsequently ascertained and inserted in the deed, in the grantor's presence, and with his assent, by the attorney who had prepared the deed, and had it in his possession, he being one of the trustees. The defendant having afterwards recognised this instrument as valid in various transactions, the Court, considering that it was originally executed as an escrow, and was not intended to be a perfect deed till all the blanks were filled up, held that the act of the grantor, in assenting to the filling of the blank, amounted to a re-delivery of the deed thus completed.[1]

§ 1635. It only remains to be seen how far the *form of pleading* will vary the effect of an altered instrument tendered in evidence, in cases where the action is brought upon the instrument, whether in its original or its altered form. First, if the action be brought on an instrument in its *original* form, and the defendant merely plead non est factum, non assumpsit, or, in the case of a bill or note, that he did not accept, indorse, or make such a security, the plaintiff will recover, though he produce an altered instrument in support of his case, if he can show that the alteration was made subsequently to the completion of the writing;[2] unless the alteration be of such a nature as to render a new stamp

[1] The same effect was given to clear and unequivocal acts of assent in pais by a feme mortgagor, after the death of her husband, as amounting to a re-delivery of a deed of mortgage, executed by her while a feme covert. Goodright *v.* Straphan, 1 Cowp. 201, 204; Shep. Touch. by Preston, p. 58. "The general rule," said Mr. Justice Johnson, in delivering the judgment of the Court, in Duncan *v.* Hodges, 4 M'Cord, 239, "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order, in the manner of execution, but in the end makes it perfect, before the delivery, it is a good deed." See ante, § 128.

[2] Hemming *v.* Trenery, 9 A. & E. 926; 1 P. & D. 661, S. C.; Davidson *v.* Cooper, 11 M. & W. 778; Mason *v.* Bradley, id. 590.

necessary, in which case the objection to the admissibility of the instrument produced can be taken under such pleas.[1] Should the defendant intend to rely on the alteration, as either establishing a new contract, if made with his consent, or as putting an end to the original agreement, if made without his consent, he must plead these facts specially, by way of discharge.[2] Secondly, if the plaintiff declare on an instrument in its *altered* form, and the alteration be *material*, it seems on principle,—though a decision of the Court of Exchequer throws much doubt upon the subject,[3]—that, under the plea of non est factum, non assumpsit, non-acceptance, or the like, the defendant will succeed, unless the plaintiff can prove that the alteration was effected previously to the completion of the instrument; for, otherwise the defendant only asserts the truth, when he says, "I did not make the promise, or sign the writing, on which you declare."[4] Lastly, the declaration may be drawn in so general a form, as to *suit equally the original or the altered instrument.* In such case, it is highly probable, that the principle established in Hemming *v.* Trenery[5] would be held to apply, and that the defendant would not be allowed to object to the alteration under a general plea.

§ 1636. Nothwithstanding the rule of law which requires the party, tendering in evidence an altered instrument, to explain its appearance, it is now decided, at least with respect to letters and ancient documents coming from the right custody, that the mere fact of their being in a *mutilated or imperfect state,* will not throw upon the party producing them the burthen of proving when, by whom, or for what purpose, they were mutilated; but such documents will be received, though the mutilation be evidently not

[1] Calvert *v.* Baker, 4 M. & W. 417, as explained by Parke, B., in Mason *v.* Bradley, 11 M. & W. 594, and in Davidson *v.* Cooper, id. 787. See Crotty *v.* Hodges, 4 M. & Gr. 561.

[2] See cases cited, p. 1461, n. 2. As to the form of such plea, see Atkinson *v.* Hawdon, 2 A. & E. 628; 4 N. & M. 409, S. C.; Davidson *v.* Cooper 11 M. & W. 787.

[3] Parry *v.* Nicholson, 13 M. & W. 778.

[4] Cock *v.* Coxwell, 2 C. M. & R. 291; 4 Dowl. 187, S. C.; Weeks *v.* Maillardet, 14 East, 568; Fazakerly *v.* M'Knight, 26 L. J., Q. B., 30. See ante, § 269.

[5] 9 A. & E. 926; 1 P. & D. 661, S. C.

accidental, provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found. The weight due to such a document may be a just matter of comment, and in many cases the jury would regard it as utterly valueless; still no legal objection can be taken to its being presented to their notice, such as it is; and the right enjoyed by the opponent, of insisting that the whole instrument shall be read, is not infringed by its admission, since that rule merely provides that no part of the deed, in the state in which it actually is, shall be withheld from the jury without the consent of the adverse party.[1]

§ 1637. Formerly a rule prevailed, that, if an instrument, on being produced, appeared to be signed by *subscribing witnesses*, one of them at least *should be called* to prove its execution;[2] but this rule, after having worked gross injustice for a long course of years, has at length been abrogated by the Legislature. The Common Law Procedure Act of 1854, among other enlightened provisions, contains the following clause:—"It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."[3] The first question, therefore, to be determined, when an attested document is tendered in evidence, is whether or not it be of such a nature as to *require attestation*. In a former chapter[4] many statutes were referred to, which render attestation necessary, in order to give validity to particular instruments; but notwithstanding such reference, it will probably be deemed convenient to enumerate, in the present connexion, the

[1] Lord Trimlestown *v.* Kemmis, 9 Cl. & Fin. 763, 774, 775; Evans *v.* Rees, 10 A. & E. 151.

[2] Doe *v.* Durnford, 2 M. & Sel. 62; Higgs *v.* Dixon, 2 Stark. R. 180; Currie *v.* Brown, 3 Camp. 283.

[3] 17 & 18 Vict., c. 125, § 26; extended by § 103 to all courts of *Civil* Judicature in England, and by §§ 29 and 98 of 19 & 20 Vict., c. 102. Ir. to all Courts of Judicature, as well criminal as all others, in Ireland. See 2nd Rep. of Common Law Commiss., p. 23, where the reasons for this change in the law are ably expounded.

[4] Part ii., Ch. xviii.

principal documents, which must still be proved by calling one or more of the subscribing witnesses.

§ 1638. This list will be found to contain, first, all instruments executed under powers, where the parties creating such powers have thought proper, for better security, to require the execution to be attested;[1] and next, wills;[2] warrants of attorney, cognovits, and satisfaction pieces;[3] conveyances to charitable uses under the Mortmain Act;[4] bargains and sales enrolled for exchanging charity lands;[5] leases under "the leasing powers Act for religious worship in Ireland, 1855;"[6] certificates of searches and memorials and some copies of enrolments granted by the registrar of deeds and wills in Yorkshire and Middlesex;[7] appointments of trustees of property conveyed for religious or educational purposes;[8] marriage registers;[9] deeds of fathers appointing guardians of their children;[10] assignments and consents under copyright acts;[11] assignments of bail bonds;[12] bills of exchange and promissory notes under 5*l.*;[13] protests of inland bills of exchange by persons not notaries;[14] agreements between owners and drivers of metropolitan stage carriages;[15] admissions of debts by traders signed out of the Court of Bankruptcy;[16] admissions by witnesses in the Court of Bankruptcy that they are indebted to the bankrupt on a balance of accounts;[17] and schedules and balance-sheets filed by prisoners in the Insolvent Debtors Court.[18]

§ 1639. Besides the documents just specified, all bills of sale of British[19] ships, together with agreements, alterations of agreements, releases and indentures of apprenticeship, executed in conformity with the provisions of the Merchant Shipping Act of 1854,[20] must respectively be attested; but in these particular cases, the subscribing witnesses need not be called to prove the

[1] See 2nd Rep. of Common Law Commiss., p. 23.
[2] Ante, §§ 961, 964 [3] Ante, §§ 1014, 1021. [4] Ante, § 1013.
[5] Id. [6] 18 & 19 Vict., c. 39, § 10, cited ante, § 1013.
[7] Ante, §§ 1461, 1468. [8] Ante, § 1013. [9] Id.
[10] Id. [11] Id. [12] Id. [13] Id. [14] Id.
[15] Ante, § 1007. [16] Ante, § 1022. [17] Id. [18] Id.
[19] Ante, § 909. [20] Ante, § 1006.

due execution of the instruments; for the statute contains, in § 526, an express enactment, that "Any document required by this Act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without the attesting witness or witnesses, or any of them."

§ 1640. Notwithstanding the clear language of the Legislature, as cited above in § 1637, that "it shall *not* be necessary to prove by the attesting witness any instrument," &c., a decision has been pronounced by Sir Richard Kindersley, which, if reliance can be placed on the report in the "Jurist," goes far towards neutralising this most salutary provision. It seems, by the report, that in the case of Reay's estate,[1] the Vice-Chancellor, after taking time to consider, and consulting the other equity judges, has stated their unanimous opinion to be, that, in spite of the Act, a deed cannot be proved in *ex-parte cases,* except by the attesting witness. Should any serious difficulty occur in obtaining such proof, special application may be made to the Court; but in all ordinary occasions the evidence of the attesting witness will be regarded as necessary. It is to be hoped that this mischievous doctrine will not become established law.

§ 1641. The general rule which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled[2] or a burnt[3] deed; as also to one, the execution of which is admitted by the party to it;[4] and that too, though such admission be deliberately made, either in open court,[5] or in a

[1] 1 Jurist, N. S. No. 10, p. 222.

[2] Breton *v.* Cope, Pea. R. 44.

[3] Gillies *v.* Smither, 2 Stark. R. 528.

[4] Abbot *v.* Plumbe, 1 Doug. 216, referred to by Lawrence, J., in 7 T. R. 267, and in 2 East, 187; and confirmed by Lord Ellenborough as an inexorable rule, in R. *v.* Harringworth, 4 M. & Sel. 353. See also, Mounsey *v.* Burnham, 1 Hare, 15. The same rule prevails in America. See Fox *v.* Reil, 3 Johns. 477; Henry *v.* Bishop, 2 Wend. 575.

[5] Johnson *v.* Mason, 1 Esp. 89, per Lord Kenyon, citing Lord Mansfield to the same effect.

subsequent agreement,[1] or even in a sworn answer to a bill of discovery filed against the party in the cause.[2] Nay, a party in a cause who is called as a witness by his opponent, cannot be required, or even permitted, to prove the execution by himself of any instrument, to the validity of which attestation is requisite, so long as the attesting witness is capable of being called.[3] So, also, the attesting witness must be called, though, subsequently to the execution of the deed, he has become blind;[4] and the Court will not dispense with his presence on account of illness, however severe.[5] If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him on interrogatories;[6] and if he be taken suddenly ill, a motion must be made to postpone the trial.[7]

§ 1642. The rule is equally applicable, whatever be the purpose for which the instrument is produced;[8] but, though the witness must in the first instance be called, yet, as he is rather the witness of the Court than of the party, great latitude will be allowed in the mode of examining him, and, if it be necessary, the judge will even permit questions in the nature of a cross-examination to be put.[9] Moreover, the party calling him is not

[1] Doe *v.* Penfold, 8 C. & P. 536, per Patteson, J. But see Bringloe *v.* Goodson, 5 Bing. N. C. 740, per Tindal, C. J., and post, § 1647.

[2] Call *v.* Dunning, 4 East, 53. But see Bowles *v.* Langworthy, 5 T. R. 366; and 1 Doug. 216, n. *f.* See also post, § 1647.

[3] Whyman *v.* Garth, 8 Ex. R. 803. Some persons may consider that the learned Barons, in this decision, have displayed a somewhat too stubborn resolution stare super antiquas vias.

[4] Cronk *v.* Frith, 9 C. & P. 197, per Lord Abinger; 2 M. & Rob. 262, S. C., nom. Crank *v.* Frith; Rees *v.* Williams, 1 De Gex & Sm. 314, 320. See contrà, Wood *v.* Drury, 1 Lord Ray. 734; Holt's R. 734, S. C.; and Pedler *v.* Paige, 1 M. & Rob. 258, where Parke, B., reluctantly yielded to the authority of Lord Holt. See ante, § 445.

[5] Harrison *v.* Blades, 3 Camp. 457, per Lord Ellenborough; see contrà, Jones *v.* Brewer, 4 Taunt. 46, where Sir James Mansfield observes, that "perhaps in some instances of sickness," the handwriting of the attesting witness may be proved. See ante, § 445.

[6] 1 Will. 4, c. 22, § 4; ante, § 472.

[7] 3 Camp. 457.

[8] Manners *v.* Postan, 4 Esp. 239, where the deed was used in evidence collaterally; R. *v.* Jones, 1 Lea. C. C. 174, where upon an indictment against an apprentice for a fraudulent enlistment the indenture was put in.

[9] Bowman *v.* Bowman, 2 M. & Rob. 501, per Cresswell, J., ante, § 1262, ad fin.

precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed.[1]

§ 1643.[2] On this rule, requiring the production of the subscribing witnesses, several *classes of exceptions* have been engrafted. *First,* when the *instrument is thirty years old,* the subscribing witnesses need not be called, as they are presumed to be dead.[3]

§ 1644. The *second exception* is, when the attesting witness has *signed the instrument merely in pursuance of a rule of some Court,* and such Court has subsequently recognised the validity of the instrument by *acting upon it.* Thus, where it was necessary for a defendant to prove that he had, as an insolvent, presented a petition for protection under the stat. 5 & 6 Vict., c. 116, the production of the petition and the proceedings in the Court of Bankruptcy duly sealed, whereby it appeared that the Court had granted an order of protection, was held to be sufficient evidence, not indeed of the *contents* of the petition, but of the *fact* of its having been presented, although an attorney, who had attested the petition by order of the Bankruptcy Court, was not called.[4] The special and very limited nature of this last exception will be better understood by referring to the case of Streeter *v.* Bartlett,[5] where the Court refused to extend its operation. There, in order to prove an admission of a debt, the plaintiff tendered in evidence the certified copy of a schedule filed by the defendant in the Insolvent Debtors' Court, which contained an entry of such acknowledgment; but as this schedule, in accordance with a rule of the Court where it was filed, was attested by the defendant's attorney, who was not called; and as, moreover, no proof was given that the Insolvent Debtors' Court had acted upon it, the Judges of the Common Pleas determined that the evidence could not be received.

[1] Ley *v.* Ballard, 3 Esp. 173, n.; Fitzgerald *v.* Elsee, 2 Camp. 635; Lemon *v.* Dean, id. 636, n.; Talbot *v.* Hodson, 7 Taunt. 251, overruling Phipps *v.* Parker, 1 Camp, 412.

[2] Gr. Ev., § 570, in part.

[3] Ante, § 74.

[4] Bailey *v.* Bidwell, 13 M. & W. 73.

[5] 5 Com. B. 562.

§ 1645. A *third exception* is when the instrument is proved to be in the *possession of the adverse party, who refuses to produce it pursuant to notice.* In this case, the party, who is driven to give secondary evidence of its contents, need not call the attesting witness, though the plea be non est factum, and though the name of the witness were mentioned in the notice, and he be actually in court.[1]

§ 1646.[2] A *fourth exception* is admitted, when the *adverse party producing* a deed pursuant to notice, *claims an interest under it in the cause.* In such case, the party producing the instrument is not permitted to call on the other for proof of the execution; for, by claiming an interest under it, he admits its validity.[3] Still, this exception only applies when the party producing the deed claims under it *some interest in the subject-matter of the cause;*[4] and, therefore, where, in an action brought for commission due to the plaintiff as agent in procuring for the defendant an apprentice, the deed of apprenticeship was produced under notice by the defendant, the plaintiff was held bound to call the attesting witness.[5] So, where a defendant, to prove himself a partner with the plaintiff, called upon him to produce a contract which they, as partners, had made with a builder, for work to be done on the plaintiff's premises; and, on its production, contended that the plaintiff claimed an interest under this instrument, inasmuch as it would enable him, if necessary, to control the builder's proceedings, or to enforce a specific performance against him, Lord Denman required proof of the execution, and the Court confirmed his ruling.[6] Moreover, to render a document admissible without proof as against the party producing it, his

[1] Cooke *v.* Tanswell, 8 Taunt. 450; Poole *v.* Warren, 8 A. & E. 588; 3 N. & P. 693, S. C. See ante, § 1615.

[2] Gr. Ev., § 571, in part, as to first five lines.

[3] Pearce *v.* Hooper, 3 Taunt. 60; Rearden *v.* Minter, 5 M. & Gr. 204; Carr *v.* Burdiss, 1 C. M. & R. 784; Orr *v.* Morice, 3 B. & B. 139; 6 Moore, 347, S. C.; Bradshaw *v.* Bennett, 1 M. & Rob. 143, per Lord Tenterden; 5 C. & P. 48, S. C.; Doe *v.* Wainwright, 5 A. & E. 520, 528; Bell *v.* Chaytor, 1 C. & Kir. 162; Doe *v.* Hemming, 9 D. & R. 15.

[4] Doe *v.* Marq. of Cleveland, 9 B. & C. 864, 869; Curtis *v.* M'Sweeny, Ir. Cir. R. 343.

[5] Rearden *v.* Minter, 5 M. & Gr. 204. See Gordon *v.* Secretan, 8 East, 548.

[6] Collins *v.* Bayntun, 1 Q. B., 117.

interest under it must be *still subsisting* at the time of the trial;[1] and, possibly, this may have been the ground of the decision in Collins *v.* Bayntun,[2] just cited, as it would seem from the report that the builder had executed the work agreed upon before the contract was produced by the plaintiff. Where both parties claim the same interest under a deed produced on notice, the party calling for its production need not prove its execution;[3] and the fact that the party producing the instrument claims an interest under it, will sufficiently appear by a statement to that effect, made by his attorney shortly before the trial.[4] The above exception does not extend to a case where a party, claiming an interest under a deed, gives it up to the adverse side some months,[5] or perhaps any time,[6] before the action; because, in such case, the party wishing to make it evidence has had the instrument in his own custody, and may therefore well be prepared to prove its execution.

§ 1647. Where an instrument requires attestation, the acknowledgment of its validity by a party to it does not, in general, as before stated,[7] waive the necessity of calling the attesting witness. Still, a few instances may be cited, in which a solemn admission by the adverse party *in reference to the cause* has been held in itself sufficient proof of execution; and these cases constitute the *fifth exception* to the rule. Thus, where a party agreed to admit a warrant of attorney "so as to enable his opponent to enter up judgment thereon," the Court held that judgment might be entered up without an affidavit of the subscribing witness.[8] So, in an action on covenant, if the defendant pay money into court on one of the breaches, this is such an admission of the validity of the deed, as to dispense with the production of the attesting witness though non est factum be pleaded.[9] In like manner, if a party or his attorney, in order to avoid expense, agree to admit

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[1] Fuller *v.* Pattrick, 18 L. J., Q. B., 236.
[2] 1 Q. B. 117.
[3] Knight *v.* Martin, 1 Gow R. 46, per Dallas, C. J.
[4] Roe *v.* Wilkins, 4 A. & E. 86; 5 N. & M. 434, S. C.
[5] Vacher *v.* Cocks, 1 B. & Ad. 147, 148.
[6] Carr *v.* Burdiss, 1 C. M. & R. 785, per Parke, B.
[7] Ante, §§ 384, 1641.
[8] Laing *v.* Kaine, 2 B. & P. 85, per Lord Eldon and Heath, J., Rooke, J., dubitante.
[9] Randall *v.* Lynch, 2 Camp. 357, per Lord Ellenborough.

the execution of an instrument which he is called upon by notice to admit, he cannot afterwards require that the attesting witness should be examined.[1] It seems also, from one or two cases, that, if a party solemnly recites a deed or will in an instrument under his *seal*, and, moreover, has *acquired* some *benefit* on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document, to prove its validity by calling the attesting witness.[2] So, if the effect of a memorandum indorsed upon an original agreement be to incorporate and make the whole one new agreement, it will suffice to prove the due execution of the memorandum, and the witness who has attested the original agreement need not be sworn.[3]

§ 1648. A *sixth* exception prevails, where a document is tendered in evidence as against a public officer, who is bound by law to have procured its due execution, and who has dealt with it as a document duly executed. For instance, where an action was brought under the old law[4] against a sheriff for taking insufficient sureties on a replevin bond, it was held that the execution of that instrument need not be proved by calling the attesting witness, if the plaintiff could show that the sheriff had assigned the bond.[5]

§ 1649.[6] A *seventh* exception is recognised, where the party, from *physical or legal obstacles, is unable to adduce* the witness.[7] Thus, if the witness be proved to be dead;[8] or to be insane;[9]

[1] Freeman *v.* Steggal, 14 Q. B. 203, per Coleridge, J. See ante, §§ 703, 704.

[2] Bringloe *v.* Goodson, 5 Bing. N. C. 738; 8 Scott, 71. S. C.; Nash *v.* Turner, 1 Esp. 217, per Lord Kenyon. See Fishmongers' Co. *v.* Robertson, 1 Com. B. 67—71, and cases there cited.

[3] Fishmongers' Co. *v.* Dimsdale, 6 Com. B. 896; 12 Com. B. 557, S. C. in Ex. Ch.

[4] Replevin bonds are now granted by the registrars of County Courts, and the jurisdiction of the sheriffs with respect to them has ceased. See 19 & 20 Vict., c. 108, §§ 63—66.

[5] Plumer *v.* Brisco, 11 Q. B. 46; recognising Scott *v.* Waithman, 3 Stark. R. 168. See Barnes *v.* Lucas, Ry. & M. 264.

[6] Gr. Ev., § 572, in some part.

[7] See ante, §§ 440, 1641.

[8] Adam *v.* Kerr, 1 B. & P. 360.

[9] Currie *v.* Child, 3 Camp. 283, per Lord Ellenborough; Bennett *v.* Taylor, 9 Ves. 381; see also 3 T. R. 712, per Buller J.

or to be out of the jurisdiction of the Court;[1] or if he cannot be found after diligent inquiry;[2] or if he have absented himself from the trial by collusion with the opposite party;[3] it will be sufficient, but perhaps not necessary in all cases,[4] to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be unknown,[5]—or if it were executed before the 22nd of August, 1843,[6] and the witness, at the time of attestation, were infamous,[7]—the execution must be proved by other evidence.

§ 1650. It is yet an undecided point whether an *eighth exception* will not be allowed in favour of *instruments executed by corporations*, and whether such a document will not be sufficiently proved by merely showing that the seal affixed is the seal of the corporation, without calling the attesting witness.[8]

§ 1651. A *ninth exception* has, in several old cases,[9] been recognised in respect of *deeds*, the validity of which depends

[1] Barnes *v.* Trompowsky, 7 T. R. 265; even though not proved to be domiciled abroad, Prince *v.* Blackburn, 2 East, 250; notwithstanding the power to examine on interrogatories under 1 Will. 4, c. 22, § 4, Glubb *v.* Edwards, 2 M. & Rob. 300, per Maule, J.; though the witness be in Dublin, Doe *v.* Caperton, 9 C. & P. 115, and Hodnett *v.* Forman, 1 Stark. R. 90. See 26 Geo. 3, c. 57, § 38. If the witness has set out to leave the kingdom, but the ship has been beaten back, he is still considered absent. Ward *v.* Wells, 1 Taunt. 461. See also Emery *v.* Twombly, 5 Shepl. 65.

[2] Cunliffe *v.* Sefton, 2 East, 183; Crosby *v.* Percy, 1 Taunt. 364; Earl of Falmouth *v.* Roberts, 9 M. & W. 469; Parker *v.* Hoskins, 2 Taunt. 223; Burt *v.* Walker, 4 B. & A. 697; Spooner *v.* Payne, 4 Com. B. 328. See post, § 1653.

[3] Egan *v.* Larkin, 1 Arm. Mac. & Ogle, 403, per Brady, C. B.; Lord Clanmorris *v.* Mullen, 1 Craw. & Dix, Abr. Cas. 8; Spooner *v.* Payne, 4 Com. B. 328.

[4] R. *v.* St. Giles, 22 L. J., M. C., 54; 1 E. & B. 642, S. C. See post, § 1659.

[5] Keeling *v.* Ball, Pea. Add. Cas. 88.

[6] When the Act of 6 & 7 Vict., c. 85, was passed.

[7] 1 St. Ev. 375; in such cases the attestation is treated as a nullity.

[8] Moises *v.* Thornton, 8 T. R. 307, per Lawrence, J.; Doe *v.* Chambers, 4 A. & E. 410; 6 N. & M. 539, S. C.

[9] Bro. Abr., Faits enroll. pl. 11, citing P. 7 E. 4, fol. 5, pl. 13, in which that point is distinctly laid down. See also Lady Holcroft *v.* Smith, 2 Fre[illegible]. 259; 12 Vin. Abr. 43, 121; 5 Co. 54; 1 Keb. 117; Thurle *v.* Madison, Style, 462; Smartle *v.* Williams, 3 Lev. 387; 1 Salk. 280, S. C.

upon the fact of their being *enrolled*.[1] No modern case has expressly decided this point, and though in practice it is still not unusual to admit such deeds on proof of enrolment, the principle of thus admitting them, except as against the party on whose acknowledgment they have been enrolled, has been questioned by Mr. Justice Buller.[2] It is worthy of remark, that in the case of Doe *v.* Lloyd, which was tried twice, and turned upon the validity of a deed enrolled under the Mortmain Act, the execution of the indenture was proved on both trials.[3]

§ 1652. Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary at law to call *one* of them;[4] and the same rule prevails in Chancery,[5] *excepting* in the case of *wills*, with respect to which it has for many years been the invariable practice of courts of equity to require that all the witnesses, who are in England, and capable of being called, should be examined.[6] The reasons for this exception appear to be, that frauds are frequently practised upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir-at-law has a right to demand proof of this fact from every one of the witnesses whom the statute has placed about his ancestor.[7] These will probably be deemed satisfactory

[1] See ante, § 1022, et seq. See further as to enrolments, ante, §§ 1461—1468.

[2] B. N. P. 255. "If divers persons seal a deed, and one of them acknowledge it, it may be enrolled, and may ever after be given in evidence as a deed enrolled; but it would be of very mischievous consequence to say therefore, that a deed, enrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 Anne, c. 18." See ante, § 389.

[3] 5 Bing. N. C. 742, and 1 M. & Gr. 683.

[4] Holdfast *v.* Dowsing, 2 Str. 1254; B. N. P. 264; Hindson *v.* Kersey, 4 Burn, Ecc. L., 118, per Lord Camden. [5] Gresley, Ev. 120.

[6] M'Gregor *v.* Topham, 3 H. of L. Cas. 155, per Lord Brougham; Bootle *v.* Blundell, 19 Ves. 494; Grayson *v.* Wilkinson, 2 Ves. 459; Townsend *v.* Ives, 1 Wils. 216; Ogle *v.* Cook, 1 Ves. 177.

[7] Per Lord Camden, in Hindson *v.* Kersey, rep. in 4 Burn, Ecc. Law, 116 119, 120, and cited Gresley, Ev. 123.

reasons for the rule; but should the soundness of the reasons admit of any doubt, the inflexibility of the rule admits of none; and it applies in full force even to issues, which are directed by a court of equity to be tried by a jury.[1] On such occasions, it is usual to say that all the subscribing witnesses must be called, in order to satisfy the conscience of the Lord Chancellor.

§ 1653.[2] The *degree of diligence* required in seeking for the subscribing witnesses is the same as in the search for a lost paper,[3] the principle being, in both cases, identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the Court, under all the circumstances. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found, as also, in general, of his relatives and others, who may be supposed capable of affording information respecting him. A reference to one or two decisions will serve to illustrate this subject. In the case of the Earl of Falmouth *v.* Roberts,[4] the plaintiff relied upon an agreement, to which his steward was the attesting witness. This man, having been charged with embezzlement, had absconded, and could not be found, though inquiries were made for him at his house, and at the inns which he was in the habit of frequenting. The Court held that this was sufficient search to let in evidence of his handwriting, although no application was shown to have been made to any member of his family. In another case, after proof that inquiry had been made at the residences of the parties to the instrument respecting the witness, and that no account could be obtained as to who he was, or where he lived, secondary evidence was admitted, though it was urged, that, in such a case, a public advertisement for him should have been inserted in the newspapers.[5] Again, in Burt *v.* Walker,[6] the defendant's clerk

[1] Bowman *v.* Bowman, 2 M. & Rob. 501.

[2] Gr. Ev., § 574, in part as to first nine lines.

[3] Ante, § 399.

[4] 9 M. & W. 469.

[5] Cunliffe *v.* Sefton, 2 East, 183.

[6] 4 B. & A. 697. For other instances, see Wardell *v.* Fermor, 2 Camp. 282; Willman *v.* Worrall, 8 C. & P. 380; Wyatt *v.* Bateman, 7 C. & P. 586; Doe *v.* Powell, id. 617; Kay *v.* Brookman, 3 C. & P. 555; Morgan *v.* Morgan, 9 Bing. 359; Spooner *v.* Payne, 4 Com. B. 328; Austin *v.* Rumsey, 2 C. & Kir. 736; ante, p. 1471, n. 2.

was the witness to his bond, and on being subpœnaed for the plaintiff, said that he would not attend. He, however, did attend, though apparently without any view of exhibiting himself as a witness; and the trial being put off, it was afterwards twice postponed on account of his absence, upon affidavits that he could not be found. Six weeks after the first postponement the cause was tried, when, it appearing that search had been made for the witness at the defendant's house and in the neighbourhood, as also at Margate, to which place the defendant stated that he had gone, evidence of his handwriting was held to be admissible. In all cases of this nature, the answers to the inquiries may be given in evidence, they being not hearsay, but parts of the res gestæ.[1]

§ 1654.[2] If the instrument be necessarily attested by *more than one witness*, the *absence of them all* must be duly accounted for, in order to let in secondary evidence of the execution;[3] but when such evidence is rendered admissible, proof of the handwriting of any *one* of the *witnesses* will, in general, be deemed sufficient, provided it be accompanied by some *evidence* of the *identity* of the party sued, with the person who appears to have executed the instrument.[4] Proof of the signature of the obligor is an obvious, though by no means the only, mode of establishing identity; and with the view of ascertaining the nature and amount of evidence, which will be deemed sufficient for this purpose, a few cases on the subject of identity will here be noticed.

§ 1655. In Jones *v.* Jones,[5] which was an action by the indorsee against the maker of a note, the attesting witness stated that he saw a party called Hugh Jones, who kept the Glasgow Tavern at Llangefni, in Anglesea, sign the note; but he added, on cross-examination, that he had not seen this person since, and that the name was a common one in Anglesea. The Court held that the

[1] Ante, § 443.
[2] Gr. Ev., §§ 574, 575, in part, as to first seven lines.
[3] Cunliffe *v.* Sefton, 2 East, 183; Wright *v.* Doe d. Tatham, 1 A. & E. 21, 22; Whitelocke *v.* Musgrove, 1 Cr. & Mee. 511; 3 Tyr. 541, S. C.
[4] Adam *v.* Kerr, 1 B. & P. 360; Nelson *v.* Whittall, 1 B. & A. 19; Doe *v.* Paul, 3 C. & P. 613.
[5] 9 M. & W. 75, 79.

plaintiff must be nonsuited, though the defendant had in one of his pleas admitted the making of the note; and Mr. Baron Parke observed, that the defendant's attorney should have been called, to say whether the person who employed him in the case was the Hugh Jones who lived at the Glasgow Tavern. The case of Greenshields *v.* Crawford,[1] was a similar action against the acceptor of a bill, which was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford." A witness proved that this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but he did not know whether that Mr. Crawford was the defendant. The Court held that this was sufficient evidence of identity, at least in the absence of an affidavit to show that the defendant was not that person. It will be seen that the only sensible distinction between these two cases, which were decided by the same court within a few months of each other, was, that in the former, the name of Hugh Jones was said to be common, whereas that of Charles Banner Crawford was certainly unusual.

§ 1656. In Simpson *v.* Dismore,[2] where an apothecary brought his action for medicines and attendance, and in order to prove that he had been duly admitted to practice, produced a licence from the Apothecaries' Company, which was granted to a person bearing his name, the Court held that no further evidence was necessary to show that he was the party named in the licence. In Russell *v.* William Gray Smyth,[3] where the question was, whether the defendant was proved to be the same person as the defender in a Scotch suit, the judges decided that there was ample evidence of identity, on the ground that the names, professions, places of abode, and ages of the parties appeared to be the same. So, in Smith *v.* Henderson,[4] which was an action on the case for negligence in navigation, it was objected that the defendant was the pilot in charge of the vessel; whereupon the plaintiff's counsel called out "Mr. Henderson," and a man in court answered "here; I am the

[1] 9 M. & W. 314. [2] Id. 47. Id. 818, 819. [4] Id. 798.

pilot." A witness then proved that this man, at the time of the accident, was acting as pilot. Baron Rolfe, thinking that this was not sufficient evidence of identity, directed a nonsuit, but the Court above set it aside. Baron Parke, during the argument, observed, "*similarity of name and residence, or similarity of name and trade, will do;*" and added in the judgment, "The defendant is sued on the face of the *declaration* as William Henderson, a pilot. A man in court answers to the name of Henderson, is a pilot, and was proved to be the pilot acting on board the vessel. He therefore fulfils the description in the *declaration* in two respects at least, since his name and calling resemble those of the alleged defendant."[1]

§ 1657. It may, however, here be observed, that the description in the declaration cannot properly be said to prove the identity of the defendant. The question is, who was served with the writ, and who has pleaded to the action? and it is obvious that no description which the plaintiff chooses to introduce into his statement of his own case, can in strictness answer this question, or affect the defendant's interest. This remark is made, because in the case above-mentioned of Greenshields *v.* Crawford, the Court appears to have acted upon a similar mistake. The decision in Smith *v.* Henderson was right, not because the defendant was described by the plaintiff as a pilot, but because the accident was proved to have been caused by a pilot named Henderson, and a person answering that name and description was *present in court*, and might therefore be fairly presumed to be the same Mr. Henderson who had pleaded to the action. In another case, in which a witness, called to prove the defendant's handwriting, had corresponded with a person bearing his name, who dated his letters from Plymouth Dock, where the defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient;[2] and in Warren *v.* Sir J. C. Anderson, Bart.,[3] where the only proof of the defendant's signature to a bill was given by a clerk of Messrs. Coutts, who

[1] 9. M. & W. 801. [2] Harrington *v.* Fry, Ry. & M. 90, per Best, C. J.
[3] 8 Scott, 384.

stated that two years before the trial, he saw a person, whom he did not know, but who called himself Sir J. C. Anderson, Bart., sign his name,—that he had since seen cheques similarly signed pass through the banking house, and that he thought the handwriting was the same as that on the bill,—the Court held that the evidence, weak as it confessedly was, might be submitted for the consideration of the jury.

§ 1658. It only remains to notice two decisions in the Court of Queen's Bench, which, recognised as they have been by the other courts,[1] go far towards neutralising an objection, which has too often been permitted to shield the unprincipled. The cases referred to are Sewell *v.* Evans, and Roden *v.* Ryde.[2] In the first of these the defendant's name was William Leal Evans; in the second, Henry Thomas Ryde; and in neither was any evidence adduced beyond the similarity of name, identifying the person whose signature was proved with the party upon whom process had been served. The Court held that no proof was necessary, observing, that if the party to be fixed with liability was a marksman, as in the case of Whitelocke *v.* Musgrove,[3] or if his name was proved to be very common in the country, as in the case of Jones *v.* Jones,[4] or if a length of time had elapsed since the name was signed, or if, in short, any other special facts were involved in the case, a stricter proof might be required: but that in ordinary cases, where no particular circumstance tended to raise a question as to the party being the same, *mere identity of name was something from which an inference might be drawn.*[5] Lord Denman, after stating that the onus of proving a negative in these cases might be safely thrown upon the defendant, partly because the proof was easy, and partly because the supposition that a wrong man had been sued was unreasonable, inasmuch as the fraud would occur to few, and the risk of punishment in

[1] Hamber *v.* Roberts, 7 Com. B. 861.

[2] 4 Q. B. 626; 3 G. & D. 604, S. C.

[3] 1 Cr. & Mee. 511; 3 Tyrwh. 541, S. C.

[4] 9 M. & W. 75. See also Barker *v.* Stead, 3 Com. B. 946.

[5] See also Murieta *v.* Wolfhagen, 2 C. & Kir. 744, per Alderson, B.; and Reynolds *v.* Staines, id. 745.

practising the fraud would be great, emphatically added, "The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should have been raised; and it is best that we should sweep it away as soon as we can."[1]

§ 1659. It has been held in America, that where the absence of the subscribing witnesses has been duly accounted for, the instrument may be read upon proof of the handwriting of the obligor, or party by whom it was executed; but it seems to be still undecided in that country, whether such proof will be admissible, without first showing an inability to prove the signatures of the witnesses.[2]

§ 1660.[3] When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer* himself, or some person who *actually saw the paper* or signature *written*. When such evidence cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are *acquainted with the handwriting*, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge, to be genuine.[4] These last modes of proof, indeed, may in all cases be given in the first instance, since the law recognises no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise a suspicion, that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

§ 1661. The *knowledge of a person's handwriting* may have been

[1] 4 Q. B. 633.

[2] Jackson *v.* Waldron, 11 Wend. 178, 183, 196, 197; Valentine *v.* Piper, 22 Pick. 90. See also R. *v.* St. Giles, 22 L. J., M. C., 54; 1 E. & B. 642, S. C., as to the English law.

[3] A portion of the following observations with respect to handwriting has already, in substance, appeared in the Law Rev. No. IV. pp. 285—304.

[4] See post, § 1667.

acquired in both or either of two ways.[1] The *first is from having seen him write;* and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had for observing the handwriting with attention;[2]—yet the evidence will be admissible, though the witness has not seen the party write for twenty years,[3] or has seen him write but once, and then only his surname.[4] Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents.[5] The proof in such cases may be very slight, but the jury will be allowed to weigh it. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.[6] Still, the party calling the witness may interrogate him, if he think proper, as to the circumstances on which his belief is founded; though if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected.[7] Where a witness, called

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[1] See 3 Benth. Jud. Ev. 598, 599.

[2] Doe *v.* Suckermore, 5 A. & E. 730, per Patteson, J.

[3] R. *v.* Horne Tooke, 25 How. St. Tr. 71, 72; Eagleton *v.* Kingston, 8 Ves. 473, 474, per Lord Eldon.

[4] 5 A. & E. 730, per Patteson, J.; Garrells *v.* Alexander, 4 Esp. 37, per Lord Kenyon; Willman *v.* Worrall, 8 C. & P. 380; Burr *v.* Harper, Holt, N. P. R. 420; Lewis *v.* Sapio, M. & M. 39. In this last case, Lord Tenterden refused to recognise the authority of Powell *v.* Ford, 2 Stark. R. 164, where Lord Ellenborough rejected the testimony of a witness, who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See also Warren *v.* Anderson, 8 Scott, 384.

[5] George *v.* Surrey, M. & M. 516, per Tindal, C. J., after some hesitation.

[6] Moody *v.* Rowell, 17 Pick. 419, overruling Slaymaker *v.* Wilson, 1 Pennsylv. R. 216.

[7] R. *v.* Murphy, 8 C. & P. 306, 307, per Coleridge, J.; Da Costa *v.* Pym, Pea. add. R. 144, per Lord Kenyon.

to establish a forgery, had become acquainted with the signature of the party, from having seen him sign his name after the commencement of the suit, for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing, that the party might, through design, have written differently from his common mode of signature.[1]

§ 1662. The *second way* in which the knowledge of a person's handwriting may be acquired, is by the *witness having seen, in the ordinary course of business, documents,* which by some evidence, direct or circumstantial, *are proved to have been written by such person.* Thus, if the witness has received letters, purporting to be in the handwriting of the party, and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party, as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible.[2] So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is, that the answer was written by the person addressed in the letter; and consequently the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person.[3] Again, the clerk who constantly read the letters, or the broker, who was consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has an opportunity of obtaining a

[1] Stanger *v.* Searle, 1 Esp. 15. See also Page *v.* Homans, 2 Shepl. 478.

[2] Doe *v.* Suckermore, 5 A. & E. 731, per Patteson, J.; 2 Nev. & P. 46, S. C.; Lord Ferrers *v.* Shirley, Fitzg. 195; B. N. P. 236; Carey *v.* Pitt, Pea. Add. Cas. 130; Tharpe *v.* Gisburne, 2 C. & P. 21; Harrington *v.* Fry, Ry. & M. 90; Burr *v.* Harper, Holt, N. P. R. 420; Com. *v.* Carey, 2 Pick. 47; Johnson *v.* Daverne, 19 Johns. 134; Pope *v.* Askew, 1 Iredell R. 16.

[3] Carey *v.* Pitt, Pea. Add. Cas. 130, per Lord Kenyon.

knowledge of his writing, though he never saw him write, or received a letter from him.[1]

§ 1663. In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature attached to an affidavit, which had been filed by the opposite party in a previous stage of the cause.[2] Here the opposite party having used the affidavit as a genuine document, was in a manner estopped from disputing the fact that it was signed by the person whose signature it bore; but perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since in another case, the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon other papers in the Master's office, which the opposite attorney admitted had been written by the defendant.[3]

§ 1664. Where, in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the attorney for the defendants, whose knowledge of the handwriting in question was founded on the circumstance, that he had received a retainer purporting to be signed by his three clients, and had acted upon it in defending the action, the Court of Common Pleas held that his testimony was inadmissible, as no proof was given that the party had ever acknowledged the signature to the attorney, and either of the other two defendants might have signed the retainer for him with his assent.[4] So, the testimony of an inspector of franks, called to prove the handwriting of a member of Parliament, has on two occasions been rejected, where the knowledge of the witness was simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he had never communicated with the member on the

[1] Doe *v.* Suckermore. 5 A. & E. 740, per Lord Denman.

[2] Smith *v.* Sainsbury, 5 C. & P. 196, per Park, J., cited by Lord Denman in Doe *v.* Suckermore, 5 A. & E. 740.

[3] Greaves *v.* Hunter, 2 C. & P. 477, per Abbott, C. J.

[4] Drew *v.* Prior, 5 M. & Gr. 264.

subject of the franks; for, in this case, the superscriptions of the letters seen by the witness might possibly have been forgeries.[1] These last decisions certainly carry the law to the verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sound rule, that a crime is not to be presumed, or so much as suspected, without special cause, in any single instance; much less in a number of unconnected instances.[2]

§ 1665. In whichever of these two ways the witness has acquired his knowledge of handwriting, it is obvious that evidence identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either aliundè, or by the testimony of the witness himself, if he be personally acquainted with the writer.[3] The witness might otherwise be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another.

§ 1666. When witnesses are called to speak to handwriting, they should declare their *belief* on the subject, though in one case it was held by Lord Kenyon, that the evidence of a witness, who, acknowledging his inability to form a belief, merely stated that the paper produced was *like* the handwriting of the individual by whom it purported to have been written, was admissible.[4] This case, though recognised by Lord Wynford,[5] has been questioned by Lord Eldon,[6] and apparently with reason. It may be very true, as Lord Eldon admits, that witnesses are occasionally pressed too much to form a belief;[7] and some allowance should certainly be made for the over-caution of a scrupulous witness; but though it may be very proper to receive the testimony of a

[1] Carey *v.* Pitt, Pea. Add. Cas. 130, per Lord Kenyon; Batchelor *v.* Honeywood, 2 Esp. 714, per id.

[2] 3 Benth. Jud. Ev. 604.

[3] See Doe *v.* Suckermore, 5 A. & E. 731, per Patteson, J.

[4] Garrells *v.* Alexander, 4 Esp. 37. See also Beauchamp *v.* Cash, D. & R., N. P. R., 3.

[5] 2 Ph. Ev. 249, n. 2.

[6] Eagleton *v.* Kingston, 8 Ves. 476. See also Cruise *v.* Clancy, 6 Ir. Eq. R. 552.

[7] Eagleton *v.* Kingston, 8 Ves. 476.

person, who, declining to express a decided belief, will yet declare that he is of *opinion*, or that he *thinks*, the paper is genuine, yet it is going a step further when the witness will only state that the handwriting is like; a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

§ 1667. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison;—it being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge;[1] the law, until very recently, did not allow the witness, or even the jury, except under certain special circumstances, actually to *compare two writings* with each other, in order to ascertain whether both were written by the same person. This technical rule of the common law,—which was certainly *not* based on common sense, and which was directly opposed to the practice of our own ecclesiastical courts,[2] of the French courts,[3] and of the courts of many of the most enlightened States in America,[4]—has,

[1] Doe *v.* Suckermore, 5 A. & E. 731, per Patteson, J.

[2] 1 Will. on Ex. 260; 1 Oughton, Ord. Jud. tit. 225, §§ 1—4; Doe *v.* Suckermore, 5 A. & E. 708—710, per Coleridge, J.; Beaumont *v.* Perkins, 1 Phillim. 78; Saph *v.* Atkinson, 1 Add. Ecc. R. 215, 216; Machin *v.* Grindon, 2 Cas. temp. Lee, 335; 2 Add. Ecc. R. 91, n. *a*, S. C.

[3] Code de Proc. Civ., part 1, liv. 2, tit. 10, §§ 193—213; Pothier, 3 Œuvr. Posth. 46; Doe *v.* Suckermore, 5 A. & E. 710, 711, per Coleridge, J.

[4] The New York Code of Civil Proc. contains the following sections relative to the proof of handwriting: "§ 1763. The handwriting of a person may be shown, by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting. § 1764. Evidence respecting the handwriting may also be given by a comparison, made by the witnesses, or the jury, with writings, admitted or treated as genuine by the party against whom the evidence is offered. § 1765. Where a writing is more than thirty years old, the comparison may be made with writings, purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact." In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant

happily for the administration of justice, been at length abrogated by the Legislature, at least so far as relates to civil proceedings. § 27 of the Common Law Procedure Act, 1854,[1] enacts, that "comparison of a disputed writing with any writing proved to the satisfaction of the *judge* to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Then comes §. 103, which provides that the above enactment,—in common with certain other clauses in the statute relating to evidence, adjournments, and other matters,—"shall apply and extend to every court of *civil*[2] judicature in England."[3]

§ 1668. Under this new law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge,[4] may be used for the purposes of

to the issue or not for the purpose of comparison of the handwriting. Homer *v.* Wallis, 11 Mass. 309; Moody *v.* Rowell, 17 Pick. 490; Richardson *v.* Newcomb, 21 Pick. 315; Hammond's case, 2 Greenl. 33; Lyon *v.* Lyman, 9 Conn. 55.

[1] 17 & 18 Vict., c. 125; the Irish Act, 19 & 20 Vict., c. 102, contains a similar provision in § 30.

[2] The word "civil" seems to have been introduced into the Act in consequence of some blunder. The Evidence Clauses,—which were in substance borrowed from Lord Brougham's Evidence Bill of 1853, and which in that bill were made applicable to all Courts alike,—were originally confined by the Common Law Procedure Bill to the Superior Courts of Common Law. In the Lords, this defect was discovered and remedied by § 103; and that section, which was drawn by the author, extended the Evidence clauses, but those alone, to "all courts of judicature." When the bill was returned to the Commons, the Attorney-General was unfortunately absent on some special retainer, and the honourable member who took charge of the measure for him, allowed the section to be altered to its present form, including in it other matters unconnected with evidence, but limiting its operation to civil Courts. The result is sufficiently absurd; as, at present, two separate laws of evidence are administered at the assizes—one at Nisi Prius, and the other in the Crown Court.

[3] By § 98 of the Irish Act, 19 & 20 Vict., c. 102, the above enactment is extended "to all courts of judicature, as well criminal as all others," in Ireland.

[4] See Egan *v.* Cowan, 30 Law Times, 223, in Ir. Ex.

comparison, although they may not be admissible in evidence for any other purpose in the cause; and next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves, or, in the event of there being no jury, by the Court. If, therefore, an action be brought by the indorsee of a bill of exchange against the acceptor, who by his plea has denied the indorsement by the drawer, it seems that the jury may, by simply comparing the indorsement with the drawing, which is conclusively admitted to be genuine,[1] find a verdict for the plaintiff, even though no witness be called to disprove the plea.[2]

§ 1669. It further appears, that any person whose handwriting is in dispute, and who is present in Court, may be required by the Court to write in its presence, and that such writing may be compared with the document in question. Moreover, in all cases of comparison of handwriting, the witnesses, the jury, and the Court may respectively exercise their judgment on the resemblance or difference of the writings produced, with respect to the general character of the handwriting, the form of the letters, the orthography of the words,[3] and the style of the composition, and also on the fact of one or more of the documents being written in a feigned hand.

§ 1670. In one respect, the enactment under discussion seems open to objection. If the word "genuine," as applied to a document, simply means,—and it can scarcely have any other meaning,—that it is in the handwriting of the person by whom it pur-

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[1] Ante, § 778.

[2] See as to the former law, Allport *v.* Meek, 4 C. & P. 267.

[3] This is a test which may often be successfully applied. At the Greenwich County Court a plaintiff, on one occasion, denied most positively that a receipt produced was in his handwriting. It was thus worded, "Received the Hole of the above." On being asked to write a sentence in which the word "whole" was introduced, he took evident pains to disguise his writing, but he adopted the above *phonetic* style of spelling, and also persisted in using the capital H. On being subsequently threatened with an indictment for perjury, he absconded.

ports to have been written, the Legislature has made no provision for the case of a party who seeks to *disprove* his signature to a receipt, bill, or other document, by comparing it with papers written by him post litem motam. This will open a door to fraud. Many men are capable of writing in several different hands; and, consequently, when the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the jury genuine documents, which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute.[1]

§ 1671. Another matter which appears to have been overlooked by the Legislature, relates to the question, how far the knowledge of a witness, who is called to prove handwriting, may be *tested* in cross-examination by showing him other documents, not admissible as evidence in the cause, nor proved to be genuine, and by then asking him whether they were written by the same hand as the paper in dispute. If the witness in such a case were to express his belief that all the documents were in the same handwriting, could the cross-examining counsel prove that those produced by him were *not* genuine, and then put them in evidence, that the jury might be enabled to appreciate the testimony given by the witness? On this subject, the authorities prior to the recent alteration in the law are conflicting,[2] and it is difficult to conjecture in what way the judges would now decide. The admission of the evidence, would, however, seem best to accord with the spirit of the new law.

§ 1672. When *documents* are of such *antiquity* that witnesses

[1] Lord Brougham's Bill of 1853 contained the following clause to avoid this evil:—"Where the handwriting of any person is sought to be *disproved* by comparison with other writings of his, not admissible in evidence for any other purpose in the cause, such writings, before they can be compared with the document in question, must, if sought to be used by the party in whose handwriting they are, be proved to have been written prior to any dispute respecting the genuineness of such document." See ante, § 1661, ad. fin.

[2] See and compare Hughes *v.* Rogers, 8 M. & W. 125; Griffits *v.* Ivory, 11 A. & E. 322; 3 P. & D. 179, S. C.; Young *v.* Honner, 2 M. & Rob. 537; 1 C. & Kir. 51, S. C., nom. Younge *v.* Honner.

who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases.[1] Such documents, when thirty years old, generally prove themselves;[2] but still occasions may arise when, in order to establish identity, it will become necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, the handwriting must be proved in some legal mode, however ancient the paper may be.[3] How, then, is this to be done? Doubtless, under the Common Law Procedure Act, 1854,[4] the proof may be established by producing from the proper custody other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and by then permitting witnesses, whether experts or others, and the Court and jury, to compare such documents directly with the paper in dispute.[5] It is also clear that, without the production of any documents for the purpose of instituting a direct comparison, the handwriting under investigation may be proved by any witness who has become acquainted with it in the *ordinary course of his business.*

§ 1673. This point was decided by the House of Lords on the claim of Sir B. W. Bridges to the barony of Fitzwalter.[6] There, it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made

[1] Doe *v.* Suckermore, 5 A. & E. 717, 718, per Coleridge, J.; 724, 725, per Williams, J.; 736, per Patteson, J.; 747, 748, per Lord Denman.

[2] Ante, §§ 74, 75.

[3] Tracy Peer. 10 Cl. & Fin. 154; Fitzwalter Peer. id. 193; Morewood *v.* Wood, 14 East, 328; Taylor *v.* Cook, 8 Price, 652.

[4] Ante, § 1667.

[5] This course was allowable to a great extent under the old law. See Davies *v.* Lowndes, 7 Scott, N. R. 168, 169, 209; Doe *v.* Tarver, Ry. & M. 143, per Abbott, C. J.; Anon. cited id. per Lawrence, J.; Roe *v.* Rawlings, 7 East, 282, n. per Le Blanc, J. on two occasions; Morewood *v.* Wood, 14 East, 328, per Hotham, B.; 20 Law Mag. 323, 324; Taylor *v.* Cook, 8 Price, 652, 653, per Richards, C. B.

[6] Fitzwalter Peer. 10 Cl. & Fin. 193. See Crawford & Lindsay Peer. 2 H. of L. Cas. 556—558.

some ninety years before by an ancestor of the claimant, was written by him. To establish this fact, the family solicitor of the claimant was called; and on his stating that he had acquired a knowledge of the ancestor's handwriting, from having had occasion at different times to examine, in the course of his business, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. In another case,[1] where, in order to prove a pedigree, it became necessary to rely upon a marriage certificate, which purported to have been written and signed eighty-five years before the trial by W. Davies, the then curate of the parish, the Court of Queen's Bench held that the document was admissible, on proof by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies, from various signatures in the original register. It was objected that some witness should have been called to speak to the death of the curate, or to have shown when he died, or at least that some search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way; but the objections were overruled as untenable.

§ 1674. But the question still remains, can a witness, in the cases just put, be called to state that he has acquired a knowledge of the handwriting in question, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures attached to documents, which are either admitted or proved to be genuine, but which are *not produced*, for the *express purpose* of speaking to the identity of the writer? The House of Lords in the Fitzwalter Peerage case[2] decided, in apparent opposition to several older authorities,[3] that such testimony was inadmissible, and the new practice established by the Common Law Procedure Act, 1854, does not seem to have interfered in any way with this decision.

[1] Doe *v.* Davies, 10 Q. B. 314.

[2] 10 Cl. & Fin. 193.

[3] See Sparrow *v.* Farrant, 2 St. Ev. 517, n. *e.* per Holroyd, J.; Doe *v.* Lyne, 2 Ph. Ev. 258, n. 1, per id.; Beer *v.* Ward, cited id., per Dallas, C. J., and Lord Tenterden; Anon. per Lord Hardwicke, cited B. N. P. 236, *b*; Doe *v.* Suckermore, cited ante, p. 1487, n. 1.

§ 1675. As the new law permitting proof of handwriting by comparison does not at present extend to our Criminal Courts, it becomes necessary to advert to two *exceptions* in the old law rejecting comparison, which have been recognised in courts of justice with tolerable distinctness. The *first exception* alluded to may thus be stated:—Where *other documents, admitted to be genuine, have already been produced as evidence in the cause, the jury may compare them with the writing in dispute.* The reason assigned for this exception is, that, as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice or direction of the Court, to examine them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause.[1] In fact, it is impossible to prevent the comparison, and, therefore, the exception may be said to rest on necessity.[2] Moreover, this course is supposed to be the less inconvenient, inasmuch as documents, which are put in for other purposes, will generally be free from all suspicion of having been unfairly selected.[3] But this last reason will not be universally applicable, because, if a paper happen to be admissible in its own nature, as bearing in however slight a degree on the cause, the judge cannot reject it, though it be avowedly put in for the sole purpose of enabling the jury to compare it with another document in dispute.[4]

§ 1676. But although in the case just put, the jury may institute, under the old law, a direct comparison between the documents in evidence, no *witness* can be called to express his opinion upon the subject. On a trial, therefore, for forgery of a bill of exchange, an expert cannot be asked whether, on comparing the signatures of the drawer, the acceptor, and the indorser of

[1] 20 Law Mag. 323, 324; Griffith *v.* Williams, 1 C. & Jer. 47; Solita *v.* Yarrow, 1 M. & Rob. 133, per Lord Tenterden; Bromage *v.* Rice, 7 C. & P. 548, per Littledale and Patteson, Js. Hammond's case, 2 Greenl. 33.

[2] Doe *v.* Newton, 5 A. & E. 514; 1 N. & P. 1, S. C.; Eaton *v.* Jervis, 8 C. & P. 273, per Gurney, B. For another application of the same principle, see the judgment of Coleridge, J., in Wright *v.* Doe d. Tatham, 4 Bing. N. C. 500.

[3] R. *v.* Morgan, 1 M. & Rob. 135, n., per Bolland, B.

[4] Waddington *v.* Cousins, 7 C. & P. 595, per Lord Denman.

the bill, he considers that they were all written by the same person.[1]

§ 1677. The *second exception* is recognised in cases, where, in order to raise an inference that a certain document has been written by a party, another immaterial document proved to be in his handwriting is put in evidence, for the purpose of showing that each paper contains similar specimens of peculiar spelling.[2] In one case,[3] where a defendant in a County Court had denied that a certain signature was in his handwriting, and had afterwards, at the instance of the judge, signed his name on a paper, which, together with the original document, had then been impounded,—the two signatures, on a subsequent trial of the defendant for perjury, were shown to the jury for the purpose of being compared. The learned judge who tried this indictment appeared to think that such a course was allowable, on the ground that the defendant's act in writing his name in Court during his examination on oath, formed part of the transaction out of which the charge arose. As this ruling is certainly calculated to promote substantial justice, reasonable hopes may be entertained that it will be upheld.

§ 1678. Independent of all cases where handwriting is sought to be proved by actual comparison, the testimony of skilled witnesses will occasionally be admissible for the purpose of throwing light upon the document in dispute. First, if the writing be *ancient*, an expert may state his belief as to the probable *period* at which it was written, because, in such a case, as the character of handwriting varies according to the progress of civilisation, antiquarian knowledge may afford much assistance in arriving at a right conclusion.[4] Secondly, if the question be whether a paper is written in a *feigned* or natural hand,[5] wit-

[1] R. *v.* Coleman, 6 Cox, C. C. 163, per Crosswell, J.

[2] Brookes *v.* Tichborne, 5 Ex. R. 929.

[3] R. *v.* Taylor, 6 Cox, C. C. 58, per Wightman, J.

[4] Doe *v.* Suckermore, 5 A. & E. 718, per Coleridge, J.; Tracy Peer., 10 Cl. & Fin. 154.

[5] Those who feel an interest in tracing a similarity between feigned and

nesses whose duty it has been to detect forgeries will probably be admissible in this country,[1] as they certainly are in America,[2] on the ground that such persons are supposed to be more capable than ordinary men of pronouncing a safe opinion on a subject of this nature.[3] Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little weight will in general be attached to the evidence which they give.[4]

§ 1679. Although in ordinary cases, when a witness is called to speak to handwriting, the document itself is produced in Court, it is obvious that this course may occasionally be highly inconvenient or even impossible. For instance, suppose it be necessary to identify a person, who has either written a paper which is lost, or has signed a record or public register, the removal of which from its proper place of custody cannot be enforced,—will a witness be allowed to prove such person's handwriting without producing the original document? This point was raised and decided in the affirmative in Sayer *v.* Glossop,[5] where the defendant, having pleaded her coverture, and having put in an examined copy of the register of her marriage with one A. B., was permitted, without producing the original register, to call a witness, who deposed that he knew one A. B., and had often seen him write; and that the husband's signature in the register, which he had examined, was in the handwriting of his friend A. B.

§ 1680.[6] The *admissibility* and *effect* of private writings, when

natural handwriting, are referred to the 4th vol. of Lord Chatham's Corresp., where, at p. 37 of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running-hand of Sir Philip Francis.

[1] R. *v.* Coleman, 6 Cox, C. C. 163, per Cresswell, J.

[2] Hammond's case, 2 Greenl. 33; Moody *v.* Rowell, 17 Pick. 490; Com. *v.* Carey, 2 Pick. 47; Lyon *v.* Lyman, 9 Conn. 55; Hubly *v.* Vanhorne, 7 Serg. & R. 185; Lodge *v.* Phipher, 11 Serg. & R. 333.

[3] R. *v.* Cator, 4 Esp. 117, 145, per Hotham, B.; Goodtitle *v.* Braham, 4 T. R. 497; Doe *v.* Suckermore, 2 Nev. & P. 18; Fitzwalter Peer. 10 Cl. & Fin. 198, per Lord Brougham.

[4] Tracy Peer. 10 Cl. & Fin. 191, per Lord Campbell; Gurney *v.* Langlands, 5 B. & A. 330.

[5] 2 Ex. R. 409.

[6] Gr. Ev., § 583, as to first three lines.

offered in evidence, have been incidentally considered, under various heads, in the preceding pages, so far as they are established and governed by any rules of law. On this head, therefore, no further comments are necessary, excepting to draw attention to a remarkable clause in the Act of 16 & 17 Vict., c. 59, which was omitted to be noticed in its proper connexion, and which provides, that "any draft or order drawn upon a banker for a sum of money payable to *order* on demand, which shall, when presented for payment, *purport* to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by, or under the direction of, the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof."[1]

§ 1681. It may be convenient here to advert to *six practical rules* of some importance, all of which will be found applicable to evidence of every description. *First*, where evidence is offered for a *particular purpose*, and an objection is taken to its admissibility for that purpose, if the Court pronounces in favour of its *general admissibility* in the cause, a court of error, on exceptions taken, will support the decision of the Court below, provided the evidence be admissible for *any purpose*.[2] The proper course for the opposing counsel to take in such a case would seem to be, to call upon the judge to explain to the jury, that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to do so, his direction might be the subject of a distinct exception, or an application might be made to the Court above for a new trial on the ground of misdirection.[3] *Secondly*, where inadmissible evidence is received at the trial *without objection*, the opposite party cannot afterwards object to its having been received, or obtain a new trial on the ground that the judge did

[1] § 19.
[2] The Irish Society *v.* Bp. of Derry, 12 Cl. & Fin. 641, 665.
[3] Id. 672—674, per Lord Brougham.

not expressly warn the jury to place no reliance upon it.[1] *Thirdly*, where evidence is objected to at the trial, the *nature* of the *objections* must be distinctly stated, whether a bill of exceptions be tendered or not; and on either moving for a new trial on account of its improper admission, or on arguing the exceptions, the counsel will not be permitted to rely on any other objections than those taken at Nisi Prius.[2]

§ 1682. *Fourthly*, where evidence is tendered at the trial on an untenable ground, and is consequently rejected, the Court will not grant a new trial merely because it has since been discovered that the evidence was admissible on another ground; but the party must go much further, and show, first, that he could not by due diligence have offered the evidence on the proper ground at the trial, and next, that manifest injustice will ensue from its rejection. His position, at the best, is that of a party who has discovered fresh evidence since the trial.[3] *Fifthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact; and, if this request be refused, he should then tender a bill of exceptions. If this course has not been pursued, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence.[4] *Lastly*, where evidence has been improperly admitted or rejected at Nisi Prius, the Court will grant a new trial, unless it be clear *beyond all doubt*, that the error of the judge could have had no *possible effect* upon the verdict, in which case they will not enable the defeated party to protract the litigation.[5] It may

[1] Goslin *v.* Corry, 7 M. & Gr. 342; Doe *v.* Benjamin, 9 A. & E. 644.

[2] Williams *v.* Wilcox, 8 A. & E. 314, 337; Ferrand *v.* Milligan, 7 Q. B. 730; Bain *v.* Whitehaven & Furness Junct. Rail Co., 3 H. of L. Cas. 1, 15—17, per Lord Brougham.

[3] Doe *v.* Beviss, 18 L. J., C. P., 128; 7 Com. B. 456, S. C.

[4] Gibbs *v.* Pike, 9 M. & W. 351, 360, 361.

[5] Wright *v.* Doe d. Tatham, 7 A. & E. 330; Baron de Rutzen *v.* Farr, 4 A. & E. 53, 57; Crease *v.* Barrett, 1 C. M. & R. 919, 933; Doe *v.* Langfield, 16 M. & W. 497. These cases overrule Doe *v.* Tyler, 6 Bing. 561; 4 M. & P. 377, S. C.; a dictum of Lord Tenterden in Tyrwhitt *v.* Wynne, 2 B. & A. 559; and one by Sir James Mansfield in Horford *v.*

further be stated, that the wrongful reception of evidence will not furnish less available ground for a new trial, although the jury accompany their verdict with a distinct and positive statement that they have arrived at it independently of the obnoxious evidence.[1]

§ 1683.[2] Having now completed the design of this Treatise, in presenting a general view of the principles and rules of the Law of Evidence, the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labour from the manner of treatment; and will rise from the study of its principles, convinced, with Lord Erskine, that, with some few exceptions,[3] "they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life."[4]

Wilson, 1 Taunt. 14. See Mortimer *v.* M'Callan, 6 M. & W. 75; Edwards *v.* Evans, 3 East, 451. The Scotch law on this subject is embodied in § 45 of 13 & 14 Vict., c. 36, which enacts that "a bill of exceptions shall not be allowed in any cause before the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions, on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived."

[1] Bailey *v.* Haines, 19 L. J., Q. B., 73, 78.

[2] Gr. Ev., § 584, in great part.

[3] See Index, tit., *Suggestions for amending the Law of Evidence.*

[4] 24 How. St. Tr. 966.

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THE END.

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